Supreme Court, U.S.
FILED
FEB 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1327

In the Supreme Court of the United States

OCTOBER TERM, 1988

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,

Petitioners,

vs.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida, FLORIDA ENGLISH CAMPAIGN, U.S. ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S. ENGLISH FOUNDATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DONALD M. MIDDLEBROOKS
(Counsel of Record)
THOMAS R. JULIN
ALICIA R. ZALESIN
EMILY WHEELER
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2800

STEVEN A. ZALESIN
WEIL, GOTSHAL & MANGES
Suite 2100
701 Brickell Avenue
Miami, Florida 33131
(305) 577-3100

Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

1. Is a petition, whose use in accordance with state election laws results directly in a statewide election on a proposed constitutional amendment, subject to the language minority requirements of the Voting Rights Act?

2. Is a claim brought by a private plaintiff under section 203 of the Voting Rights Act required to be heard by a three-judge district court?

PARTIES TO THE PROCEEDING BELOW

The caption of this case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

Table of Authorities v
The Opinions in the Courts Below 1
Jurisdiction 1
Statutes at Issue 2
Statement of the Case 3
Argument 8

I. The Court of Appeals Decided an Important Federal Question that Has Not Been, but Should Be, Decided by this Court 8

II. The Decision of the Court of Appeals Conflicts with Applicable Decisions of this Court 11

A. The Eleventh Circuit's Decision on the Merits of the Voting Rights Act Claims Conflicts with Decisions of this Court 12

1. The Decision Conflicts with this Court's Holding in *Allen* 13

2. The Decision Failed to Accord the Attorney General's Guidelines the Deference that this Court Has Required 16

3. The Decision Conflicts with this Court's Decisions in *Terry* and *Allwright* 19

B. The Eleventh Circuit's Affirmance of the Single District Judge's Refusal to Convene a Three-Judge Court Conflicts with Decisions of this Court 22

Conclusion 25

Appendix (Separate Cover)

Opinion of the United States Court of Appeals for the Eleventh Circuit, No. 88-6068 (Nov. 4, 1988) A1

Order Denying Application for Three-Judge Panel, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 18, 1988) A31

Order Granting Leave to Intervene, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 18, 1988) A33

Final Memorandum Decision, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 24, 1988) A35

Final Judgment Denying Declaratory and Injunctive Relief, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 24, 1988) A42

Judgment of the United States Court of Appeals for the Eleventh Circuit, No. 88-6068 (entered Nov. 4, 1988) A43

Order Denying Petition(s) for Rehearing and Suggestion(s) of Rehearing In Banc, No. 88-6068 (11th Cir. Dec. 19, 1988) A45

Plaintiffs' Application for Three-Judge Court, filed in No. 88-1880-CIV-KEHOE (S.D. Fla.) (Oct. 17, 1988) A47

Memorandum of Law in Support of Plaintiffs' Application for Three-Judge Court, filed in No. 88-1880-CIV-KEHOE (S.D. Fla.) (Oct. 17, 1988) A50

TABLE OF AUTHORITIES

Cases

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 9, 10, 11, 13, 14, 23, 24, 25

Bailey v. Patterson, 369 U.S. 31 (1962) 11, 12

Bender v. Williamsport Area School Dist., 475 U.S. 534, 106 S.Ct. 1326 (1986) 2

Buckley v. Valeo, 424 U.S. 1 (1976) 19

Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) 20-21

City of Pleasant Grove v. United States, 479 U.S. 462, 107 S.Ct. 794 (1987) 16, 17

Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1988) 1, 10

Delgado v. Smith, No. 88-1880-CIV-JWK (S.D. Fla. Oct. 24, 1988), *aff'd*, 861 F.2d 1489 (11th Cir. 1988) 1, 10

Gjersten v. Board of Election Comm'rs, 791 F.2d 472 (7th Cir. 1986) 25-26

Hadnott v. Amos, 394 U.S. 358 (1969) 25

Henderson v. Graddick, 641 F. Supp. 1192 (M.D. Ala.), *appeal dismissed*, 479 U.S. 1023 (1986) 20

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) 11, 12

Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988), *petition for cert. filed*, No. 88-6376 (U.S. Jan. 19, 1989) 10, 15

Smith v. Allwright, 321 U.S. 649 (1944) 19, 20, 21

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 19

Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930) 11

Terry v. Adams, 345 U.S. 461 (1953) 19, 20, 21

Toney v. White, 488 F.2d 310 (5th Cir. 1973) 25, 26

United States v. Board of Comm'rs, 435 U.S. 110 (1978) 16, 17
Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) 15, 21
Zaldivar v. City of Los Angeles, 590 F. Supp. 852 (C.D. Cal. 1984), *rev'd*, 780 F.2d 823 (9th Cir. 1986) 15

Constitutional Provisions

U.S. Const. amend. XV 19
Fla. Const. art. XI, § 3 4

Statutes

28 U.S.C.A. § 1254(1) (West 1966) 1
28 U.S.C.A. § 1291 (West 1966 & Supp. 1988) 6
28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) 5
42 U.S.C.A. §§ 1971-1973bb (West 1981 & Supp. 1988) 3
42 U.S.C.A. § 1973aa-1a (West 1981 & Supp. 1988) 2, 5, 6, 12, 13, 22, 24, 25
42 U.S.C.A. § 1973aa-2 (West 1981) 3, 5, 22
42 U.S.C.A. § 1973b(f)(4) (West 1981 & Supp. 1988) 2, 5, 12, 13, 22, 25
42 U.S.C.A. § 1973c (West 1981) 13, 23
42 U.S.C.A. § 1973l(c)(1) (West 1981) 15, 21
Fla. Stat. § 15.21 (1987) 22
Fla. Stat. § 16.061 (1987) 22
Fla. Stat. § 100.371 (1987) 21
Fla. Stat., Chapters 97-106 (1987) 4

Rules

28 C.F.R. § 55.19(a) (1988) 16, 19
Fla. Admin. Code Chapter 1C-7 (1988) 4

Fla. Admin. Code ann. r. 1C-7.009 (1988) 21
Fla. Admin. Code ann. r. 1C-70091 (1988) 21

Legislative History

S. Rep. No. 295, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 774 .....15, 23
H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975) 23, 24
Letter from Drew S. Days, III, Acting Assistant Attorney General, Civil Rights Division, to Kenneth D. Webb, Registrar of Voters, Monterey County, California, quoted in full in *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 97th Cong., 1st Sess., serial no. 24, part 3 (1981), at 2327 18

Other Authorities

In California, They're Voting on Nearly Everything, BusinessWeek, Oct. 31, 1988, at 30 8
Just Say 'No' - Or 'Yes', Newsweek, Nov. 7, 1988, at 63 8
Review and Preview, Barron's, Nov. 7, 1988, at 5, col. 3 8
Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 Yale L.J. 1418 (1988) 8-9
Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 Yale L.J. 569 (1987) 9
Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345 (1987) 9

THE OPINIONS IN THE COURTS BELOW

The opinion sought to be reviewed is *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988). The opinion affirms *Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D. Fla. Oct. 24, 1988).

Both opinions are reprinted in the separately bound appendix accompanying this petition. References to materials contained in the appendix will be made by the notation "(A)." The opinion of the court of appeals appears at A1, and the opinion of the district court appears at A35.

JURISDICTION

(i) *Date and Time of Judgment Below.* The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on November 4, 1988. (A43).

(ii) *Denial of Rehearing.* The court of appeals denied rehearing on December 19, 1988. (A45).

(iii) *Statutory Basis for Jurisdiction.* This Court has jurisdiction to review the Eleventh Circuit's opinion pursuant to 28 U.S.C.A. § 1254(1) (West 1966). Petitioners believe, however, that neither the court of appeals nor the district court had jurisdiction to decide this case. That argument is set forth in a petition for writ of mandamus that petitioners have filed with this Court. If the Court agrees with petitioners' argument that neither the court of appeals nor the district court had jurisdiction, then this Court may correct the lower courts' erroneous

exercise of jurisdiction, but may not review the merits of the case. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S.Ct. 1326, 1331 (1986).

STATUTES AT ISSUE

Section 4(f)(4), Voting Rights Act, 42 U.S.C.A. § 1973b(f)(4):

> Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 203(c), Voting Rights Act, 42 U.S.C.A. § 1973 aa-1a(c):

> Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or

in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 204, Voting Rights Act, 42 U.S.C.A. § 1973 aa-2:

> Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 1973aa of this title, or (b) undertakes to deny the right to vote in any election in violation of section 1973aa-1 or 1973aa-1a of this title, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of Title 28, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall be to the Supreme Court.

STATEMENT OF THE CASE

This case involves an initiative to amend the Florida constitution to declare English the state's official language. At issue is whether, in view of the language minority provisions of the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1973bb-1 (West 1981 and Supp. 1988) ("Voting

Rights Act" or "Act"), it was permissible to conduct this initiative (the "Official English Initiative") using a petition written only in English.

Florida citizens who desire to amend their state constitution may initiate and circulate a petition in support of a proposed amendment. If enough valid signatures are collected, and if they meet requirements of geographic distribution, the amendment may be placed on the ballot and put to Florida's electors for their consideration. Fla. Const. art. XI, § 3.

The Florida Election Code, Fla. Stat., Chapters 97-106 (1987), and the Florida Administrative Code, Fla. Admin. Code Chapter 1C-7 (1988), prescribe in detail the manner in which a petition initiative must be conducted. These provisions delineate the form that a petition must take, and require that the petition be approved by the Florida Secretary of State before it is circulated. They also specify procedures and standards for submission of signed petitions to the Secretary for certification and ballot positioning.

In accordance with these statutes and rules, the proponents of the Official English Initiative in 1984 obtained the approval of the Secretary of State to circulate a petition on the Initiative. The petition approved by the Secretary was written exclusively in English. In August, 1988, the Secretary certified that the sponsors had collected enough valid signatures for the measure to be placed on the ballot.

Of the 366,555 signatures that the Secretary certified as valid, 63,558 were obtained from electors in six Florida counties that are covered by the language minority provisions of the Voting Rights Act. In such counties, when-

ever the state provides any materials related to the electoral process, it must provide them in the language of the applicable minority group—here, Spanish.

The petitioners filed a pre-election complaint on October 11, 1988, seeking declaratory and emergency injunctive relief. The complaint alleged that two sections of the Voting Rights Act—sections 203 and 4(f)(4)—had been violated because the Official English petitions improperly had been provided only in English in the six Florida counties covered by the language minority provisions of the Act. The complaint further alleged that the Official English Initiative should not have been certified to be put on the ballot for a vote in the upcoming election because the signatures on the improper petitions should not have been counted. Without those signatures, the Initiative would not be supported by the 342,939 signatures required by state law to place the measure on the general election ballot. Simultaneously with the filing of the complaint, the petitioners moved for a preliminary injunction against any votes being cast or counted with respect to the amendment in the upcoming November election.

Because claims under section 203 of the Act are required to be heard by a three-judge district court (with a direct appeal to the Supreme Court), the petitioners applied, pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) and section 204 of the Voting Rights Act, 42 U.S.C.A. § 1973aa-2 (West 1981), for hearing of the cause by a three-judge court. (A47, 50). The single district judge denied the application, finding that those statutes did not require a three-judge court in this instance. (A31).

The parties agreed to consolidate the adjudication of the petitioners' requests for preliminary and permanent relief. At a one-day non-jury trial, the petitioners presented proof that the failure to circulate the petitions in Spanish suppressed awareness of the Initiative in the Hispanic community and reduced the likelihood of successful opposition to the Initiative. The single district judge nevertheless, on October 24, 1988, rendered a final order denying the requested relief and dismissing the complaint on the merits. (A42; *see also* A35-41). In a memorandum decision, the district court concluded that Florida's involvement in the petition process was "ministerial" and, therefore, did not amount to "state action" that would trigger application of the Voting Rights Act. (A37-41). Accordingly, the district court did not determine whether the "Official English" petitions were "electoral materials" within the scope of the Act. (A40).

Petitioners filed a notice of appeal from the judgment to the court of appeals on October 25, 1988. On October 27, 1988, the appellate court granted the petitioners' request for expedited disposition in light of the impending election and entered an order requiring that petitioners file their brief within four days (by October 31, 1988).[1] Thereafter, on November 2, 1988, the United States Department of Justice, as amicus curiae, filed a brief in support of the petitioners' position.[2]

---

1. In their brief to the court of appeals, the petitioners raised the error in the district court's denial of the application for a three-judge court. Petitioners did, however, allege that the court of appeals had jurisdiction to review the final judgment of the district court under 28 U.S.C.A. § 1291 (West 1966 & Supp. 1988) and briefed the case on the merits.

2. In its brief, the Justice Department contended that petitions are covered by the language minority provisions of the

(Continued on following page)

On November 3, 1988, a panel of the court of appeals heard argument on the appeal. The following day, the divided panel rendered its decision, affirming the judgment of the district court, with one judge dissenting. (A1). The majority, having determined that the Voting Rights Act protects "voting," concluded that the Official English Initiative petitions were "too removed from the voting booth to fall under the Act." (A8). The majority held further that Florida did not "provide" the Initiative petitions within the meaning of the Act because the state's regulation of the petition process was merely "ministerial." (A18-20). In dissent, Judge Anderson argued that the Initiative petitions are "materials . . . relating to the electoral process" and therefore, are within the scope of the Act. (A20-23). In addition, Judge Anderson found that Florida's regulation of the petition process was extensive enough to warrant the conclusion that the state "provides" the petitions. (A26). Neither the majority opinion nor the dissent addressed the jurisdictional problem created by the single district judge's decision to adjudicate a claim that could be heard only by three judges. The petitioners' suggestion for rehearing in banc was denied on December 19, 1988. (A45).

Footnote continued—

Act. The Department reasoned that petitions are "provided" by the state and that they must be covered by the language minority provisions as materials or information "relating to the electoral process," because, like party primaries, they can "result[ ] *automatically* in a candidacy or a question being placed on the ballot." Brief for the United States As Amicus Curiae at 9 (emphasis in original). The Justice Department also argued that a single district judge lacked jurisdiction to adjudicate the petitioners' section 203 claim. *Id.* at 9-15.

ARGUMENT

I.

The Court of Appeals Decided an Important Federal Question that Has Not Been, but Should Be, Decided by this Court

Many states now authorize their citizens to initiate public votes on amendments to their constitutions by gathering signatures on petitions. In recent years, this method of self-government has become increasingly popular and has led to public votes on numerous state constitutional amendments dealing with a wide array of topics.[3] "Proposition 13" in California—an amendment that imposed strict limitations on taxation of property—is perhaps the most celebrated of the initiative amendments. Other successful initiatives have led to votes on such diverse amendments as one that requires public officials to disclose their finances, and another that increases cigarette taxes. The "Official English Amendment" at issue in this case has been, and continues to be, the subject of petition drives in many states.[4]

---

3. *See, e.g., In California, They're Voting on Nearly Everything*, BusinessWeek, Oct. 31, 1988, at 30 (reporting that 29 initiatives had been placed on the California ballot and that more than $100 million would be spent promoting or fighting the initiatives); *Just Say 'No' - Or 'Yes'*, Newsweek, Nov. 7, 1988, at 63 (reporting on the more than 200 referenda and initiatives on the November, 1988 ballot in 41 states); *Review and Preview*, Barron's, Nov. 7, 1988, at 5, col. 3 (reporting that "on ballots across the country are a host of constitutional amendments, referendums and initiatives concerning everything from car insurance to the rights of privacy of AIDS victims to abortion to closing nuclear power plants") (emphasis omitted).

4. *See* Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 Yale

(Continued on following page)

The popularity of initiatives makes this Court's decision whether the Voting Rights Act applies to petitions to amend state constitutions of critical importance to language minorities not only in Florida, but across the country. A decision on this issue could safeguard such minorities from direct attacks such as that launched by supporters of Official English[5] and from more subtle efforts to diminish their rights through the use of the petition process.[6] It also could ensure that this country's growing language minority population can fully participate in a newly vital process through which fundamental political change is effected.

This Court has never expressly addressed the precise Voting Rights Act issue raised here,[7] but it should

---

Footnote continued—

L.J. 1418, 1418 (1988); Note,*"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345, 1345-47 (1987).

5. One commentator has observed: "By its own account, the 'official English' movement seeks to stimulate debate on the sensitive issue of language and to promote social unity through a common tongue. In fact, however, the movement makes language the rallying point for simmering intolerance, frustration, fear, and distrust." Note, *supra* note 4, at 1362.

6. *See* Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 Yale L.J. 569, 574 (1987) (pointing out that the right to petition is effectively denied, and therefore oppressive, to those who have limited financial means).

7. The Court has, however, decided the issue of whether petitions to place names on election ballots are subject to the Voting Rights Act. *See Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). The decision below directly conflicts with the principles established in *Allen* and with other decisions of this Court. Petitioners believe that *Allen* and the other decisions with which the Eleventh Circuit's decision conflicts *compel* the conclusion that initiative petitions are subject to the language minority provisions of the Voting Rights Act. This reason for granting this petition is discussed in section II *infra*.

do so now.[8] The Eleventh Circuit's interpretation of the Voting Rights Act permits the willful exclusion of minority citizens from an increasingly important electoral process—a result which Congress could not have intended. The Voting Rights Act should be construed in the broad manner required by this Court. *See Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969). The Eleventh Circuit's decision refuses to follow this mandate and permits all future initiative petitions to be drafted and circulated in a language understood only by the English-speaking electorate.

The unpalatable conclusion of the court of appeals derives from a series of errors in its application of the law relating to the Voting Rights Act. The discrepancies between the Eleventh Circuit's ruling and the decisions of this Court and other courts of appeals are pointed out below.

---

8. The same issue is raised in *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), *petition for cert. filed*, No. 88-6376 (U.S. Jan. 19, 1989), a case in which the Tenth Circuit vacated an injunction entered by the district court against an election on a petition initiative proposal to make English the official language of the State of Colorado. The Tenth Circuit based its reversal on three conclusions: (1) that petitions relate to neither "voting" nor the "electoral process" as required by the Act; (2) that the Attorney General's interpretive guidelines are "suggestive" rather than "mandatory" and, therefore, are not entitled to the deference that the district judge accorded them; and, (3) that because the role of state officials in the petition process is "ministerial," Colorado does not "provide" the petitions for purposes of the Act.

Like the Eleventh Circuit in *Delgado*, the Tenth Circuit in *Montero* decided an important federal question that has not been, but should be, decided by this Court. Moreover, the Tenth Circuit's decision is based on reasoning that is contrary to the decisions of this Court. On January 19, 1989, the plaintiffs in *Montero* filed in this Court a petition for writ of certiorari. Petitioners urge that the Court grant both the *Montero* and *Delgado* petitions for writ of certiorari.

II.

The Decision of the Court of Appeals Conflicts with Applicable Decisions of this Court

In affirming the decision of the district court that initiative petitions are not subject to the language minority provisions of the Voting Rights Act, the court of appeals failed to follow the principles established in a number of seminal decisions of this Court. This is the first point of error discussed below. Further, in affirming on the merits the district court's denial of petitioners' section 203 claim, the court of appeals departed from this Court's decision in *Allen* that a three-judge court is required to hear such a claim. For these reasons, the petition for a writ of certiorari should be granted and the decision of the Eleventh Circuit should be vacated.[9]

---

9. Petitioners believe that the single district judge's refusal to convene a three-judge court should have precluded the court of appeals from affirming the district court's decision because the sole remedy is a writ of mandamus from this Court directing the district court to convene a three-judge court. Accordingly, petitioners also have filed with this Court a petition for writ of mandamus to direct the district court to convene a three-judge court to hear the petitioners' claims. *See Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10, 16 (1930) (holding that a single judge's dismissal on the merits of a claim required to be heard by three judges is reviewable only by writ of mandamus). If this Court agrees that the writ of mandamus should issue, the Court should also issue a writ of certiorari. The writ of certiorari is required so that the Eleventh Circuit's decision can be vacated and this case can be remanded to the district court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (remanding to the district court case which had been appealed to the court of appeals); *cf. Bailey v. Patterson*, 369 U.S. 31 (1962) (remanding to the district court case which had been appealed to the Supreme Court). The writ of mandamus is required to ensure that petitioners receive the relief they seek. *Stratton*, 282 U.S. at 18; *cf.*

(Continued on following page)

A. The Eleventh Circuit's Decision on the Merits of the Voting Rights Act Claims Conflicts with Decisions of this Court

In extending the protections of the Voting Rights Act to members of language minorities, Congress required that:

> Whenever any State or political subdivision subject to the prohibitions of . . . this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, . . . it shall provide them in the language of the applicable language minority group as well as in the English language.

Act § 4(f)(4), 42 U.S.C.A. § 1973b(f)(4) (West 1981 & Supp. 1988); *see also* Act § 203(c), 42 U.S.C.A. § 1973 aa-1a(c) (West 1981 & Supp. 1988). In analyzing whether Florida's amendment-by-initiative procedure is covered by this statute, the court of appeals correctly engaged in a two-step inquiry: first, whether petitions used to conduct such initiatives are "materials or information relating to the electoral process"; and second, whether such petitions are "provided" by the state. The majority of the Eleventh Circuit panel answered both questions in the negative. As demonstrated below, the ruling of the court of appeals conflicts directly with controlling decisions of this Court.

Footnote continued—

Idlewild, 370 U.S. at 716 (finding formal action on petition for mandamus unnecessary where case remanded for expeditious action consistent with Supreme Court opinion on certiorari review of same case); *Bailey*, 369 U.S. at 34 (remanding for expeditious action consistent with Supreme Court views in decision vacating, on appeal, order convening three-judge court).

1. The Decision Conflicts with this Court's Holding in Allen

This Court settled the question of whether petitions are within the scope of the Voting Rights Act shortly after the Act's provisions were adopted. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court squarely held that petitions that affect what appears on the ballot on election day are "voting" materials subject to the Act's requirements.

In *Allen* the Court considered, *inter alia*, whether section 5 of the Voting Rights Act[10] applies to Mississippi's petition process for placing the names of independent candidates on the general election ballot. 393 U.S. at 551, 570.[11] The Court held that state laws concerning nominating petitions are a "procedure with respect to voting" within the coverage of the Act. *Id.* at 570.

This Court's holding in *Allen* that Mississippi's nominating petitions are within the ambit of section 5 compels a conclusion that Florida's initiative petitions are subject to the language minority requirements of sections 4 and 203. *See* Dissenting Opinion of Anderson, J. (A21). On its face, the language of section 5 (covering procedures "with respect to voting") is no broader, and is arguably more narrow, than the language of sections 4 and 203 (covering "materials . . . relating to the electoral process"). Moreover, the nominating petitions at issue in *Allen* served the same purpose, at the same stage of the electoral

---

10. Section 5 of the Act requires covered jurisdictions to preclear with the Attorney General any change in a "standard, practice, or procedure with respect to voting." 42 U.S.C.A. § 1973c (West 1981).

11. The Court in *Allen* reviewed a number of consolidated decisions. Its discussion of the Mississippi nominating petitions appears in its treatment of Case No. 36.

process, as did the initiative petitions in this case: both directly preceded the placement of names or issues on the ballot for the general election. No relevant distinction between the two types of petitions can be drawn. The Eleventh Circuit's ruling on the initial statutory inquiry, that petitions are not "materials relating to the electoral process," was, therefore, an improper departure from the holding of *Allen*. *See* Dissenting Opinion of Anderson, J. (A23).[12]

The decision of the court of appeals is also in direct conflict with the *Allen* Court's reading of the legislative history of the Voting Rights Act. Throughout its opinion, the majority of the Eleventh Circuit panel presumed that the Voting Rights Act applies only to the casting of ballots at the polls.[13] Such a reading of the Act was improper. In reaching its conclusion that petitions are covered by the Act, the Court in *Allen* emphasized that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' . . . [Congress had] an intention to give the Act the broadest possible scope." 393 U.S. at 565-67 (citations omitted).[14] The legislative

---

12. In its brief as amicus curiae, the United States Department of Justice contended that "a petition must certainly be considered as material or information 'relating to the electoral process' just as a party primary election is considered action relating to the electoral process" because, "[i]n each case, the action results *automatically* in a candidacy or a question being placed on the ballot." Brief for the United States As Amicus Curiae at 9 (emphasis in original); *see also id.* at 20-24.

13. For example, in its analysis of whether the petitions were provided by the state, the court of appeals noted that "[t]he state's sole concern is a fair presentation on the *ballot* in accordance with state law." (A20) (emphasis in original).

14. Indeed, the Voting Rights Act itself defines the term "vote" to "include all action necessary to make a vote effective

(Continued on following page)

history of the Act clearly reflects Congress's intent to eradicate discrimination in all phases of the electoral process. *See, e.g.*, S. Rep. No. 295, 94th Cong., 1st Sess. 26, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 792 ("Outright exclusion and intimidation at the polls are only two of the problems [that language minority voters] face"). For this reason, another United States Court of Appeals, in adhering to this Court's decision in *Allen*, has stated in dicta that "[t]he election itself is merely the culmination of [the electoral] process . . . . The range of conduct 'relating to the electoral process' includes . . . compliance with other statutes to place a name or an issue on the ballot." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 833 (9th Cir. 1986).[15]

Footnote continued—

in any primary, special, or general election, including . . . action required by law prerequisite to voting. . . ." 42 U.S.C.A. § 1973l(c)(1) (West 1981). The Eleventh Circuit ignored Congress's own definition of the term.

15. The Eleventh Circuit opinion cites approvingly the district court's decision in *Zaldivar v. City of Los Angeles*, 590 F. Supp. 852 (C.D. Cal. 1984), *rev'd*, 780 F.2d 823 (9th Cir. 1986). The *Zaldivar* trial court's analysis was harshly and persuasively criticized by the Ninth Circuit, which reversed on the only issue before it: whether sanctions against the plaintiff were appropriate under Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832-34 (9th Cir. 1986) ("Zaldivar II").

The Ninth Circuit's statements in *Zaldivar II*, while made in dicta, clearly reveal that the Ninth Circuit takes a view contrary to that taken by the Eleventh Circuit in the instant case and the Tenth Circuit in *Montero*, namely that initiative petitions are covered by the language minority provisions of the Act. *See Zaldivar II*, 780 F.2d at 833 & n.11. Relying on the Tenth Circuit's decision in *Montero*, 861 F.2d 603, the Eleventh Circuit reasoned that the Act applies only to issues or candidates once they have been certified for placement on the ballot, and not to those preliminary steps that are required to place an issue or candidate on the ballot. (A18). The Ninth Circuit, on the other hand, concluded that the "argument that a recall notice is only a preliminary step to voting and therefore is unaffected by the bilingual provisions of the Act is without merit. *Zaldivar II*, 780 F.2d at 833 n.11.

2. The Decision Failed to Accord the Attorney General's Guidelines the Deference that this Court Has Required

The Attorney General of the United States, in published guidelines for the implementation of the language minority provisions of the Voting Rights Act, has directed:

> (a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and *petitions*.

28 C.F.R. § 55.19(a) (1988) (emphasis supplied). The Attorney General's delineation of "petitions" as materials that must be provided in minority languages is entitled to considerable deference in accordance with the decisions of this Court. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 468, 107 S.Ct. 794, 798 (1987); *United States v. Board of Commissioners*, 435 U.S. 110, 131-32 (1978).

Notwithstanding this guideline, and despite the submission of a brief by the United States as amicus curiae (in which the Justice Department contended that the petitions in this case were clearly covered by the Voting Rights Act), the Eleventh Circuit found that the State of Florida was not required to provide initiative petitions in Spanish. The Eleventh Circuit held that the Attorney General's guidelines, though entitled to deference, are only "suggestive," and that the "primary responsibility" for deciding what materials fall within the Act's coverage

rests with local officials, whose views are entitled to at least the same (and perhaps more) deference. (A10-11). The court of appeals therefore embraced an interpretation of the Act that it said was consistent with the one allegedly adopted by Florida election officials. (A11).[16]

This analysis is seriously flawed and represents a departure from this Court's conclusion that the Attorney General's regulations are entitled to considerable deference. The Attorney General, who is charged with enforcement of the Voting Rights Act, is far better qualified to opine on its meaning than are local officials. *See Pleasant Grove,* 479 U.S. 462; *Board of Commissioners,* 435 U.S. 110. In fact, the great deference that this Court has accorded the Attorney General's interpretation of the Act is based on the "extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *Board of Commissioners,* 435 U.S. at 131; *see also Pleasant Grove,* 479 U.S. at 468, 107 S.Ct. at 798.

The Attorney General's view was particularly deserving of deference in this case because his "interpretation mirrors the language of the statute itself and Congress has implicitly endorsed the Attorney General's inclusion of petitions as relating to the electoral process."

---

16. The court of appeals incorrectly assumed that Florida state officials had made a determination (worthy of deference) that petitions are not within the Act's scope. The record is devoid of support for this assumption. In fact, the position taken by the state Attorney General below strongly suggests that, prior to the commencement of this lawsuit, state officials never even considered whether petitions should be provided in minority languages.

(A23) (Dissenting Opinion of Anderson, J.) (*citing* legislative history of the 1982 extension of the Voting Rights Act).[17] The Eleventh Circuit's elevation of the "opinion" of local officials over that of the Attorney General is poor precedent that weakens the Justice Department's ability to enforce the Voting Rights Act effectively and indeed, undermines the Act itself. The Eleventh Circuit's construction would substitute the views of local officials for a consistent interpretation of this federal legislation, and would require deference to just those local officials that Congress sought to regulate through passage of the Act.

Moreover, as the dissenting judge convincingly argued, while the Justice Department guideline requires each jurisdiction to determine what materials are covered, it "does not provide a license to evade the mandate of the language minority provisions of the Voting Rights Act." (A22 n.2). While local officials are encouraged to fashion bilingual election procedures that serve the specific needs of their jurisdictions, those officials cannot strip the Act of its meaning by choosing to ignore the

---

17. In 1982, Congress extended the bilingual provisions of the Voting Rights Act, without change, after being made aware of the following interpretation accorded by the Attorney General:

> It is our understanding that nominating petitions need to be read and understood by voters who are asked to sign them. These petitions are therefore of the type of material subject to the [Act's] minority language requirement.

Letter from Drew S. Days, III, Acting Assistant Attorney General, Civil Rights Division, to Kenneth D. Webb, Registrar of Voters, Monterey County, California, quoted in full in *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 97th Cong., 1st Sess., serial no. 24, part 3 (1981), at 2327.

minimum duties of compliance enumerated by the Attorney General in 28 C.F.R. § 55.19(a). (A22 n.2).[18]

3. The Decision Conflicts with this Court's Decisions in Terry and Allwright

The court of appeals also contravened the controlling decisions of this Court in its analysis of the second statutory question—whether the State of Florida "provided" the initiative petitions. In their brief to the court of appeals, the petitioners contended that the inquiry on this issue should be guided by this Court's holdings in *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944). These fifteenth amendment decisions, cited by Congress in the legislative history of the Voting Rights Act and thereby informative of the Act's intended construction, adopt a functional test for "state action" where voting rights are at stake.[19] Based

---

18. The court of appeals also stated that, in order to "harmonize" the Act with the first amendment, it was necessary to limit the reach of the Voting Rights Act to matters involved in casting a vote. (A14). This concern was unfounded. As Judge Anderson pointed out in dissent, "[t]he minority language translation required by the Voting Rights Act imposes no conceivable hindrance to circulating the petitions or collecting signatures . . . . Clearly, the substance of the speech to be communicated is not affected by the Spanish translation of the proposal." (A26 n.5). Judge Anderson also correctly noted that "[t]he Voting Rights Act, as well as other federal regulation of the electoral process, has repeatedly withstood constitutional challenges to its validity." (A26 n.5) (*citing Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Proponents of "Official English" have no more first amendment right to circulate their Official English petitions only in English than did Texas political parties to exclude blacks from their primaries.

19. Under *Terry* and *Allwright*, state action exists, even where the activity complained of is primarily private, so long as there can be shown "State responsibility—that somewhere,

(Continued on following page)

upon its conclusion that the petition process does not involve "voting," however, the court of appeals declined to apply *Terry* and *Allwright*. In support of that finding, the majority declared that " 'the "electoral process" . . . does not commence' " until a measure is certified for the ballot. (A18) (citation omitted).

The Eleventh Circuit's rationale for its refusal to apply the state action principles established in *Terry* and *Allwright* is contrary to the teachings of those very cases. Both *Terry* and *Allwright* involved attempts by private political parties in Texas to exclude blacks from voting in the parties' primary elections. The defendants in those cases argued (much as the court of appeals in this case found) that the right to vote did not apply because the discriminatory conduct was wholly private and involved no state action. This Court disagreed, holding in each instance that the effect of private exclusion of blacks from preliminary stages of the electoral process was to abridge the right of such citizens to participate fully in subsequent, state-run elections. *Terry*, 345 U.S. at 465-70; *Allwright*, 321 U.S. at 661-66.

Since these decisions, it has been settled that the right to vote includes, and that the Voting Rights Act protects, the freedom to participate in primary elections that precede general elections. *See, e.g., Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala.), *appeal dismissed*, 479 U.S. 1023 (1986); *Busbee v. Smith*, 549 F.

Footnote continued—

somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." *Terry*, 345 U.S. at 473 (Frankfurter, J., concurring). The Florida initiative process clearly satisfies this test for state action.

Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *cf.* 42 U.S.C.A. § 1973l(c)(1) (West 1981). The contrary conclusion of the Eleventh Circuit in this case—that "the electoral process . . . does not commence," and electoral freedoms therefore do not accrue, until an issue is actually certified for the ballot—is repugnant to the teachings of *Terry* and *Allwright*[20] and cannot support the court's rejection of the "state action" principles established in those cases.[21]

---

20. The finding also contradicts the statements made by the Ninth Circuit in *Zaldivar II*. *See* discussion *supra* at note 15.

21. The court of appeals stated that it had concluded that the petitions at issue were not "provided" by the state because the role of state officials in the initiative process is "ministerial." (A20). As the United States Department of Justice argued in its amicus brief in the court of appeals: "That is hardly the point. Writing instructions for registering to vote, for instance, is a ministerial task which is clearly covered by Section 4(f)(4)." Brief for the United States As Amicus Curiae at 17 n.12. The relevant inquiry instead is the extent to which state law regulates the use of petitions.

The Florida Administrative Code prescribes in detail the form that all petitions to amend the Florida Constitution must take. Fla. Admin. Code ann. r. 1C-7.009. The Administrative Code even provides a "form" petition that is recommended for use by those who wish to sponsor an amendment initiative. *Id.* r. 1C-7.009(7). And, under the Florida Election Code, before a petition proposing a constitutional amendment may be circulated, the Florida Secretary of State must approve its format. Fla. Stat. § 100.371(3) (1987).

The Election Code and accompanying regulations set forth a procedure whereby the sponsor of an initiative must submit the signed petitions to state officials who verify and certify the number of valid signatures and determine whether the constitutional formula has been met. Fla. Stat. § 100.371(4) (1987); Fla. Admin. Code ann. r. 1C-7.0091 (1988). If it has, the Secretary of State issues to the sponsor a certificate of ballot position for the proposed amendment. Fla. Stat. § 100.371(5) (1987). Finally, the Secretary of State is required to submit the text of the proposed amendment to the Attorney General

(Continued on following page)

B. The Eleventh Circuit's Affirmance of the Single District Judge's Refusal to Convene a Three-Judge Court Conflicts with Decisions of this Court

In the complaint, the petitioners alleged that the actions of the respondents abridged both sections 203 and 4(f)(4) of the Voting Rights Act. Congress has determined that claims advanced under section 203 must be heard by a three-judge court and an appeal from such a court's judgment must be to this Court.

Section 204 of the Act provides that claims brought under section 203 "shall be heard and determined by a court of three judges . . . and any appeal shall be to the Supreme Court." 42 U.S.C.A. § 1973aa-2 (West 1981). Although section 204 provides for enforcement of section 203(c) only by the Attorney General, the legislative history of section 203(c) clearly indicates that Congress intended also to allow private parties, such as the petitioners in this case, to enforce section 203(c). In enacting section 203 and amending section 4 of the Act, Congress stated:

Footnote continued—

of Florida, who in turn must petition the Florida Supreme Court for an advisory opinion as to whether the proposal complies with the state's "single-subject" rule for all enactments. Fla. Stat. §§ 15.21, 16.061 (1987).

The Department of Justice found it "difficult to envision a regulation which more comprehensively dictates the preparation of the form than that imposed by Florida." Brief for the United States As Amicus Curiae at 18 (footnote omitted). Agreeing with this analysis, the dissenting judge below properly concluded that Florida's extensive regulations, coupled with the requirement of approval of a petition by the Secretary of State, satisfies the Act's requirement that petitions be "provided" by the state. (A23-27).

> Title III [containing section 203] authorizes the Attorney General to bring suit against any state or political subdivision which fails or refuses to comply with its prohibitions. Of course, private persons who are injured by the failure or refusal of a state or political subdivision to comply would also have the right to bring suit.

H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975) (citing *Allen*); *see also* S. Rep. No. 295, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 806-07 & n.40 (referring to the importance of private actions and specifically actions to enforce the rights of Spanish-speaking voters). Accordingly, Congress's clear intention was to permit private enforcement actions to complement federal enforcement.[22]

This Court has held that an implied private right of action based on an express right of action for the Attorney General which must be heard by a three-judge court also must be heard by a three-judge court. *Allen*, 393 U.S. 544. At issue in *Allen* was section 5 of the Voting Rights Act which requires covered jurisdictions to preclear changes in voting procedures by obtaining from a three-judge district court in the District of Columbia a declaratory judgment that the change does not have a racially discriminatory purpose or effect. *See* 42 U.S.C.A. § 1973c (West 1981). The provision states that

---

22. Six years prior to enactment of the language minority provisions in 1975, the Supreme Court held in *Allen* that Congress intended to create a private right of action to enforce section 5 of the Voting Rights Act, 42 U.S.C.A. § 1973c, despite section 5's failure expressly to authorize private enforcement. 393 U.S. at 554-57.

any action thereunder—a preclearance action—must be heard by a three-judge court. *Id.*

In *Allen*, the Court implied a private right of action to enjoin covered jurisdictions from implementing voting changes which have not been precleared and concluded that such an action should also be heard by a three-judge court. 393 U.S. at 554-63. The Court held that Congress had required three-judge court review in section 5 to provide additional protection to states whose electoral procedures were being significantly disrupted by the preclearance process. *Id.* at 562-63. The Court further held that a private suit filed to require a jurisdiction to submit a voting change for a preclearance determination sufficiently disrupted state electoral procedures to infer that Congress would have wanted such actions heard by three-judge courts. *Id.* As the Court reasoned, "[a]lthough a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains." *Id.*

As the *Allen* Court recognized, where Congress considered disruption of state activities sufficient to warrant a three-judge court for the cause of action expressly provided in the Act, a private right of action read into that enforcement mechanism by implication must be regarded as having the same requirement.[23]

---

23. The legislative history of the enactment of section 203 and of its enforcement mechanism supports this conclusion. Congress viewed private enforcement of section 203 as a complement to enforcement by the Attorney General. *See* H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975). Either type of court action—by the Attorney General or by a private citizen—

(Continued on following page)

In affirming the decision of the single district judge, declining to convene a three-judge court and denying both the section 4(f)(4) and section 203 claims on the merits, the court of appeals in the instant case departed from the decision of this Court in *Allen*. The reasoning set forth by the Court in *Allen* in its interpretation of section 5 of the Act compels the conclusion that a private action brought under section 203 must, like an action brought by the Attorney General pursuant to that section, be heard by a three-judge court with a direct appeal to this Court.

CONCLUSION

The Court should grant the petition for writ of certiorari. Although the constitutional amendment at issue already has been voted on and adopted, the petitioners, having diligently sought pre-election relief, are entitled to seek a post-election remedy by their petition for writ of certiorari. *See, e.g., Toney v. White*, 488 F.2d 310, 313-14 (5th Cir. 1973) (*en banc*). This Court, and the courts below, have the power to grant such relief, either by invalidating the election results on the Official English amendment or by granting prospective relief. *See, e.g., Hadnott v. Amos*, 394 U.S. 358 (1969) (ordering a new election); *Gjersten v. Board of Election Commissioners*,

---

Footnote continued—

would equally disrupt normal state electoral procedures. There is thus no language, nor any logic, to support a conclusion that Congress intended an implied private right of action to enforce section 203 to circumvent the protections of a three-judge panel it required for an Attorney General action.

791 F.2d 472, 478-79 (7th Cir. 1986) (prospective relief); *Toney*, 488 F.2d at 315 (primary election set aside).

Respectfully submitted,

DONALD M. MIDDLEBROOKS
(Counsel of Record)
THOMAS R. JULIN
ALICIA R. ZALESIN
EMILY WHEELER
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2800

STEVEN A. ZALESIN
WEIL, GOTSHAL & MANGES
Suite 2100
701 Brickell Avenue
Miami, Florida 33131
(305) 577-3100
Attorneys for Petitioners

No. 88-1327

Supreme Court, U.S.
FILED
FEB 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,

Petitioners,

vs.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida, FLORIDA ENGLISH CAMPAIGN, U.S. ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S. ENGLISH FOUNDATION, INC.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DONALD M. MIDDLEBROOKS
(Counsel of Record)
THOMAS R. JULIN
ALICIA R. ZALESIN
EMILY WHEELER
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2800

STEVEN A. ZALESIN
WEIL, GOTSHAL & MANGES
Suite 2100
701 Brickell Avenue
Miami, Florida 33131
(305) 577-3100

Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Eleventh Circuit, No. 88-6068 (Nov. 4, 1988) A1

Order Denying Application for Three-Judge Panel, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 18, 1988) ..A31

Order Granting Leave to Intervene, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 18, 1988) A33

Final Memorandum Decision, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 24, 1988) A35

Final Judgment Denying Declaratory and Injunctive Relief, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 24, 1988) A42

Judgment of the United States Court of Appeals for the Eleventh Circuit, No. 88-6068 (entered Nov. 4, 1988) A43

Order Denying Petition(s) for Rehearing and Suggestion(s) of Rehearing In Banc, No. 88-6068 (11th Cir. Dec. 19, 1988) A45

Plaintiffs' Application for Three-Judge Court, filed in No. 88-1880-CIV-KEHOE (S.D. Fla.) (Oct. 17, 1988) A47

Memorandum of Law in Support of Plaintiffs' Application for Three-Judge Court, filed in No. 88-1880-CIV-KEHOE (S.D. Fla.) (Oct. 17, 1988) A50

(November 4, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-6068

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,
Plaintiffs-Appellants,

versus

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, and DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida,
Defendants-Appellees,

and

FLORIDA ENGLISH CAMPAIGN, U.S. ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S. ENGLISH FOUNDATION, INC.,
Intervenors-Appellees.

Expedited Appeal from the United States District Court for the Southern District of Florida

(November 4, 1988)

Before FAY AND ANDERSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

FAY, Circuit Judge:

This is an expedited appeal from a federal district court judgment dismissing a complaint which sought to enjoin certain State of Florida officials from conducting an election on a citizen initiative to amend the state constitution planned for November 8, 1988. The proposed amendment to the Florida Constitution would make English the official language of the State of Florida. As required by Florida law, proponents of the amendment circulated a petition to gather signatures in support of placing the proposed amendment on the ballot. The issue on appeal is whether the circulation of the petition, written only in English, in designated bilingual political subdivisions violated § 203(c) of the Federal Voting Rights Act. The controlling provision of the Voting Rights Act requires a state which distributes "materials or information relating to the electoral process" to certain bilingual political subdivisions to provide them "in the language of the applicable language minority group as well as in the English language." 42 U.S.C. § 1973b(f)(4) (1965). Because we find that the Voting Rights Act does not apply to initiative petitions and the involvement by the state officials in the initiative process does not constitute state action, we affirm the district court's denial of the injunction.

I. BACKGROUND

On October 11, 1988, the plaintiffs/appellants, four registered voters whose primary language is Spanish, filed a complaint in federal district court seeking declaratory and injunctive relief under the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1974(e) (West 1981 & Supp. 1988) ("Act"). The appellants sought to restrain the

Secretary of State of Florida and the Supervisors of Elections of Florida from conducting a vote on a proposed constitutional amendment in an election planned for November 8, 1988.[1] The proposed amendment to the Florida Constitution (the "Official English Initiative") provides:

> (a) English is the official language of the state of Florida.
>
> (b) The Legislature shall have the power to enforce this section by appropriate legislation.

The Florida Constitution sets forth several methods for amending its provisions, including voter initiative. Citizens who wish to amend the constitution may initiate a petition and circulate it throughout the state gathering signatures in support of the amendment. If enough signatures are collected with the proper geographic distribution, the amendment will be placed on the general ballot for Florida voters' consideration. Fla. Const. art. XI, §3. In addition to the signature requirements established by the Florida Constitution, various state statutes charge state officials with limited duties in the course of the initiative process.

For example, the Secretary of State must determine that the petition signatures meet the number and geographic distribution requirements, approve the form of the petition and submit it to the Attorney General of Florida specifying that the petition sponsors have fulfilled certain formal requirements. *See* Fla. Stat. §§ 100.371(4) & 15.21 (1987). Upon receiving the petition, the Attorney

---

1. The Florida English Campaign, U.S. English Legislative Task Force, Inc., and U.S. English Foundation, Inc. intervened as defendants. These organizations support the proposed constitutional amendment and represent the interests of the 362,555 proponents of it.

General of Florida must petition the Florida Supreme Court for an advisory opinion on whether the amendment addresses only one subject matter, as required by the state constitution, and whether the amendment's form and style meet specified requirements. Fla. Stat. §16.061 (1987). Finally, the Florida Supervisors of Elections are charged with verifying and validating the petition's form and signatures. Fla. Stat. §100.371(3) and (5) (1987). The district court found that the appellees fully complied with the prescribed state process to amend the constitution.

In complying with the prescribed procedure, the Official English Initiative sponsors circulated a petition written only in English to obtain the requisite number of signatures to put the amendment on the ballot. The appellants contend this circulation violated the Voting Rights Act section which provides that whenever a state subject to rules prohibiting discrimination against citizens of language minorities:

> provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language. . . .

42 U.S.C. § 1973aa-1a(c). Florida has six counties identified under the Act as language minority political subdivisions.

The appellants argued before the district court that the amendment was improperly on the ballot because the Act applied to the initiative petitions and required that the sponsors circulate both English and Spanish copies of the petition in the special bilingual areas. The appellants contended that the Act applied to the initiative process

since the state officials' involvement constituted state action under the Act, and the initiative petitions were materials relating to the electoral process within the language of the Act. The district court disagreed, finding the involvement by state officials in the initiative process did not constitute state action. Therefore, it refused to enjoin a vote on the amendment.

On October 26, 1988, plaintiffs filed an expedited appeal contesting the denial of the injunction. The question before this court is whether the district court erred in denying the injunction. A district court ruling on a preliminary injunction is reviewable only for abuse of discretion. *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985). That discretion is guided by four elements which must be established before a preliminary injunction is proper. *Id.* One element the movant must show is probable success on the merits. *Id.* To statisfy this element, the appellants must make a showing that the petitions are within the language "other materials or information relating to the electoral process" and that the role of the state officials here constituted state action. We will deal with these two issues respectively.

II. INITIATIVE PETITIONS ARE NOT MATERIAL COVERED BY THE ACT.

A. *History*

In examining whether or not these initiative petitions come within the Voting Rights Act, we should begin with the language of the statute and the legislative intent behind the words used. Section 1973b(f)(4) states:

> Whenever any State or political subdivision subject to the prohibition [against discrimination against citi-

> zens of language minorities] provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language.[2]

It is clear that Congress intended the Act to be given "the broadest possible scope." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). However, an examination of the legislative history demonstrates that in enacting the Act and its amendments, Congress was concerned exclusively with the ability of all citizens to exercise effectively their right to *vote*.

The Voting Rights Act of 1965 was enacted to remedy the systematic exclusion of blacks from the polls by the use of poll taxes, literacy tests, and similar devices:

> Section 4(a) – To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device. . . .

42 U.S.C.S. § 1973(b) (1986). There is no question that the sole purpose of this legislation was to ensure the integrity of the registration and voting process by eradicating barriers which had previously prevented blacks from voting.

The amendments to the Act passed in 1975 extended the Act's coverage to four other minority groups, including

---

2. The language of 42 U.S.C. § 1973aa-1a(c) is nearly identical.

Hispanics. For the first time, Congress prohibited English-only elections in jurisdictions where more than five percent of the voting age citizen population was made up of any single language minority group, and the jurisdiction had a low voter registration or turnout in the 1972 presidential election. Title 3 of Section 203 required that any jurisdiction covered by the Act, which provides official registration or election materials, must make the materials available in the language of the particular minority language group as well as in English. The Committee on the Judiciary emphasized that minority language groups were being obstructed from exercising the franchise since they were unable to understand the ballot and other materials provided at the polls. 1975 *U.S. Code Cong. & Admin. News*, 774, 800-804.

Finally, in 1982, Congress amended the Act by, *inter alia*, providing for assistance *at the voting booth* for groups such as the blind and disabled, and others who may be unable to cast their vote without help. Once again, it seems clear that the purpose of Congress was to further expand access to the ballot. Significantly, Congress has never shown any intent, either in the text of its legislation or in the legislative history, to expand coverage of the Act to materials distributed by private citizens. While undertaking such an expansion in the law might be within the power of Congress under the Fifteenth Amendment, it is an inappropriate step for us to take.

B. *Case Law*

The overly broad interpretation of the Act urged by appellants has been rejected by every court squarely to face the issue. In *Zaldivar v. City of Los Angeles*, 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*, 780

F.2d 823 (9th Cir. 1986), the court held that a notice of intention to recall, published in English only by proponents of a recall election, did not violate the Act. In a well-reasoned opinion, the court explained that the petition process was far too removed from the voting booth to fall under the Act:

> [T]he language of the statute indicates that it applies to information relating to the electoral process. . . . Such a position requires a rather distorted view of the electoral process because nothing one would associate with an election occurs at that stage; principally, no voting occurs. . . The Court cannot reasonably conclude that such conduct violates the Act when it is merely the first step in a process which might ultimately lead to the holding of an election to recall an elected official. . . . [L]egislative history indicates Congress was concerned about impediments to a citizen's ability to exercise his right to vote. Spanish speaking citizens cannot be considered to have been deprived of their right to vote by the publication of a notice of intent to recall in English only.

Id. at 855. *See also Gerena-Valentin v. Koch,* 523 F.Supp. 176 (S.D.N.Y. 1981) ("The failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote. . . .").

Most recently, in *Montero v. Meyer,* Nos. 88-2469, 88-2470 (10th Cir. Nov. 1, 1988), the Tenth Circuit faced a situation nearly identical to that before us. In that case the Tenth Circuit reversed a district court's order which had preliminarily enjoined the Secretary of State of Colorado from conducting an election on a proposed amend-

ment to the state constitution. The defendants, members of the Official English Committee, had circulated a petition in English only, to gather enough signatures to have the proposition placed on the ballot for the general election.

In reversing the district court's preliminary injunction, the circuit court rejected two of the plaintiff's contentions concerning the reach of the Act. First, the court held that the circulation of an initiative petition is not a "prerequisite to voting" under 42 U.S.C. § 1973 1(c)(1) since it does not "relate directly to the casting of a ballot" and thus cannot be included within the definition of "voting" under § 1973b(f)(4). Slip op. at 7.[3] Second, the court held that the Act does not apply to the petition process in its own right.

The history of the Act, the stated intention of Congress, and the relevant case law persuade us that the Voting Rights Act could not properly be applied to the case before us.

C. *Attorney General Guidelines*

We reject appellant's contention that the interpretive guidelines issued by the Department of Justice regarding the language minority provisions of the Act require a contrary result. The guidelines state:

> (a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required

---

3. The court also noted that "[i]mplicit in . . . the common definitions of the concept of voting is the presence of a choice to be made. . . . Thus, applying the concept of voting to a process which provides no choice defies the commonly accepted usage of the term." *Id.* at 8.

> to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, informational materials, and petitions.

28 C.F.R. § 55.19(a) (1987). Appellant cites this section as authority for the proposition that petitions are included in the Act's definition of electoral material. While we agree with appellant that the interpretation of the agency charged with enforcing a particular law is entitled to considerable deference, *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986); *Veterans Admin. Medical Center v. Federal Labor Relations Auth.*, 675 F.2d 260 (11th Cir. 1982), we are not persuaded to find that initiative petitions are thus properly treated as electoral material.

First, as the court noted in *Montero*, these same guidelines expressly state that they are intended to be suggestive only: "This subpart [§§ 55.14-55.21] sets forth *the views of the Attorney General* with respect to the requirements of section 4(f)(4) . . . concerning the provision of minority language materials . . . ." 28 C.F.R. § 55.14(a) (emphasis added). Second, despite their eagerness to defer to the view of the Attorney General, the appellants fail to note that the guidelines themselves recognize that the primary responsibility for interpreting the provisions of the Act rests with the officials of the covered jurisdictions. Section 55.2(c), 28 C.F.R. states in relevant part:

> The determination of what is required for compliance with section 4(f)(4) and section 203(c) is the

> responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction.

Section 55.14(c), 28 C.F.R. states in relevant part:

> It is the responsibility of the jurisdiction to determine what actions by it are required for compliance with the requirements of section 4(f)(4) and 203(c) and to carry out the actions.

Thus we find that the appellees' determination that the initiative petition need not be circulated in Spanish under the Act is entitled to at least the same and possibly greater deference than is the suggested interpretation of the Justice Department. Since we find the interpretation of the state officials more consistent with the language and clear intent of the statutes, the guidelines are not persuasive.

D. *First Amendment Considerations*

We note also the serious First Amendment questions which would be raised were we to adopt the interpretation of the minority language provision urged by appellants. The Florida Constitution expressly provides that "[t]he power to propose the revision or amendment of . . . this constitution by initiative is reserved to the people . . . ." Fla. Const. Art. XI, §3. In establishing the mechanism of initiative petition, Florida vested its citizenry with the right and the responsibility to make needed changes in the Constitution. Thus any degree of governmental hindrance upon the freedom of a given group of citizens to pursue the initiative petition process with whomever, and concerning whatever they choose must be viewed with some suspicion.

In *Meyer v. Grant*, 108 S.Ct. 1886 (1988), the Supreme Court ruled that a Colorado statute prohibiting the use of paid circulators to gather signatures on an initiative petition violated the First and Fourteenth Amendments. The Court articulated its free speech concerns in language which is easily applicable to the case before us:

> Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment. . . . The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'

Id. at 1891-92.[4] The characterization by the Supreme Court of initiative petitions as "core political speech" counsels us toward caution when asked to declare that federal law requires the State to impose a bilingual requirement on a petition originated by private citizens pursuant to Florida law.

---

4. *See also Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (attempts to regulate solicitation of charitable contributions necessarily infringe upon protected speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (campaign expenditure limitation held to be an impermissible burden on right to core political expression).

In other cases concerning state statutes which purported to further some state interest by imposing restrictions on private political activity, the Supreme Court has repeatedly stressed the primacy of the rights of free speech and association. In *Williams v. Rhodes,* 393 U.S. 23 (1968), the Court struck down an Ohio statute which required any new political party seeking a position on the ballot in a presidential election to obtain petitions signed by 15% of the qualified electors who voted in the last gubernatorial election. Despite the state's claim that the provision was necessary to promote political compromise and stability, the Court held that "this [state] interest cannot justify the very severe restrictions on voting and associational rights which Ohio has imposed." *Id.* at 32.

More recently, in *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986), the Court struck down a Connecticut statute which required voters in any political party primary to be registered members of that party. The Court invoked a long line of First Amendment precedent in holding that the burden this imposed on private political association could not be sustained:

> The nature of the appellees' First Amendment interest is evident. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. As we have said, the freedom to join together in furtherance of common political beliefs

> *necessarily presupposes the freedom to identify the people who constitute the association.*

Id. at 214 (emphasis added) (citations omitted). The Court went on to note that the right of "like-minded citizens in support of common political goals" to organize themselves is particularly important "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 215-16.

We are similarly reluctant to construe a federal statute to mandate the imposition of a substantial burden on the right of political association, particularly where the clear language of the Act does not so require. It is hard to imagine that in passing the Act, Congress could have intended that private citizens seeking to further their own political goals through the initiative petition process be subject to specific language requirements. Rather, the interests of both the First Amendment and the Voting Rights Act can be harmonized by limiting the latter to those activities involved in casting a vote and not to political speech.

III. STATE ACTION IMPLICATIONS

The appellants contend that the district court erred in holding that the state's involvement in the petition process neither constituted state action nor triggered application of the Voting Rights Act, 42 U.S.C. § 1973b(f)(4). More specifically, they challenge the district court's determination that the petitions were formulated by private citizens with only minimal, ministerial regulation by the state. The appellants argue that the regulatory scheme set out in various Florida statutes governing the

initiative process amounts to state action in "formulating" the petitions as provided in the Voting Rights Act. We disagree and hold that the district court properly concluded that the acts performed by state officials in the initiative process were ministerial in nature and did not involve state action.

Once again we stress that the Constitution of the State of Florida, in article XI, section 3, expressly reserves to the people the right to amend the constitution by initiative. That section provides:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith. . . .

Fla. Const. art. XI, §3. The state cannot impede or diminish this process so long as it reserves the right of initiative to the people. *Meyer v. Grant*, ... U.S. ....., 108 S.Ct. 1886, 1893 (1988). The section further delineates the procedure for processing the initiative which is codified in the Florida Election Code, chapters 97-106 of the Florida Statutes. Fla. Stat. §97.011 (1987). Under these sections, the secretary of state is charged with limited ministerial duties regarding the initiative process. As discussed earlier, the secretary must determine whether the total number and geographic distribution of petitions is proper, approve the format of the petition, and finally submit it to the Attorney General of Florida and certify that the formal petition requirements have been complied with. However, contrary to appellants' position, these duties do not constitute state formulation of the initiative petition.

In *Montero v. Meyer*, Nos. 88-2469, 88-2470 (10th Cir. Nov. 1, 1988) the Tenth Circuit addressed this precise

issue under the Colorado constitutional initiative scheme.[5] The court held that the Voting Rights Act did not apply to an initiative petition which sought to establish English as the official language of Colorado. In discussing whether the state regulation of the initiative process constituted state action, the court said that

> [t]he acts performed by [state] officers are designed primarily to make the initiative process fair and impartial, and do not constitute providing the petitions to the electorate. At most, the acts of the state officers could be regarded as "regulatory," but state regulation is insufficient to convert private action into state action.

Id. at p. 14-15 (footnote and citations omitted). This reasoning apples to the present case. The Florida initiative procedures merely provide the framework for the general public to submit proposed amendments to the constitution for inclusion on the general election ballot. The secretary of state and attorney general act only to assist all citizens in complying with the legal requirements for such petitions primarily as to form. They neither censor nor endorse the content of any initiative petitions. As the district court noted, the Florida Constitution mandates that a petition be placed on the general election ballot once it conforms to certain format requirements and the single-subject rule. Thus, the statutory scheme serves solely to facilitate proposal of amendments through private action rather than through complex state action.

---

5. Although we note that the Colorado statutory regulation of the initiative process differs somewhat from that of Florida, we are persuaded by the Tenth Circuit's reasoning in this case involving nearly identical issues of the application of §1973b(f)(4) to proposed constitutional amendments by voter initiative.

As discussed earlier, in *Zaldivar v. City of Los Angeles, supra,* the court held that the Voting Rights Act did not apply to a notice of intention to recall a city councilman initiated pursuant to a private citizen petition. In finding that the Act did not apply to the situation where private citizens were wholly responsible for initiating the action, the court stated that the Act did apply to instances relating to the electoral process. *Id.* at 855. The court reasoned and emphasized that the petition process is distinct from the electoral process since in the former, nothing associated with an election happens; principally, no voting occurs. *Id.* According to the court, the petition procedure merely comprises the first step in a process which might ultimately result in an election. It does not implicate the voting process itself.[6] *Id.* We agree.

The distinction between the petition process and the electoral process is relevant in examining the appropriate standard for state action to be applied in this case. The appellants argue that the Voting Rights Act was enacted to implement the guarantees of the fifteenth amendment and therefore, the relaxed standard delineating state action in that context is applicable. Appellants' reliance on the fifteenth amendment cases is misplaced. Although it is true that the Act's legislative history encompasses concerns to protect "the fundamental principle that the right to vote shall not be denied or abridged . . . on account of race or color," H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2439, when a process other than one impli-

---

6. *See also, Gerena-Valentin v. Koch,* 523 F. Supp. 176, 177 (S.D.N.Y. 1981) (no violation of the Voting Rights Act since failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote).

cating the constitutional right to vote is challenged, the correct standard regarding state action involves analysis under the fourteenth amendment.

As stated by the Tenth Circuit in *Montero, supra,* "applying the concept of voting to a process which provides no choice [such as the initiative petition process] defies the commonly accepted usage of the term." *Id.* at p. 8. Moreover, the court held "that the 'electoral process' to which the minority language provisions of the Act apply does not commence . . . until the Secretary of State certifies the measure is qualified for placement upon the ballot, and that signing of an initiated petition is not 'voting.'" *Id.* Thus, since the initiative process in the present case is not "voting," state action is present only if: 1) the governmental and private actors share a "symbiotic relationship," *Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982) such that the state is recognized as a joint participant in the challenged activity, *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961); 2) the government has delegated a traditional state power to the private party, *Jackson v. Metropolitan Eidson Co.,* 419 U.S. 345, 352 (1974); or 3) the government and the private party share a close nexus such that the private party's actions are deemed those of the state. *Id.* at 351. Florida's regulatory scheme meets none of these standards.

No state action link exists between the proponents of the English language petition and the state statutory scheme. The state does not initiate the petition, does not draft the language of the petition, does not address the merits of the proposal and does not participate in any way in the circulation of the petition or in the

collection of signatures.[7] Rather, all of this action is taken by private citizens. The state's responsibility is to ensure that the petition meets the requirements of law and will fairly present the proposition that may or may not be placed before the electorate. Such regulation is not sufficient to transpose such private conduct into state action. It is only after a petition is successfully subscribed to that it becomes a matter to be put to a vote—a part of the electoral process.

As the district court noted, "the petitions represent the exercise by individuals of their fundamental rights to express themselves freely and to petition the government for redress of grievances, which are protected against governmental intrusion by the First Amendment to the United States Constitution." The United States Supreme Court recognized that circulation of a petition involves activity protected as core political speech. *Meyer*, *supra*, at 1892. Consequently, the right of the people of Florida to propose this constitutional amendment by initiative implicates crucial first amendment protections. State regulation that attempts to make certain that the views of hundreds of thousands of its citizens can be fairly voted upon by the electorate does not equate with

---

7. In contrast to Florida's initiative petition scheme, the State of Massachusetts itself prints and *provides* initiative petitions to its electorate. The state also pays for the cost of printing the petitions. *See* Mass. Const., Articles of Amendment, Amend. Art. 48, § 3. Pursuant to the Voting Rights Act, Massachusetts prints its petitions in both English and the language of the applicable language minority group. However, we note an important distinction between states which pay for and print their own petitions, and those, like Florida, which leave these actions wholly to the private citizen proponents of the petition. In the latter situation, the purely private acts do not trigger state action.

state action. The state's sole concern is a fair presentation on the *ballot* in accordance with state law.

These concerns, along with the lack of state action in the purely ministerial statutory scheme governing initiative petitions, mandate this court to uphold the district court's denial of the Appellant's petition for injunctive relief. AFFIRMED.[8]

ANDERSON, Circuit Judge, dissenting:

Respectfully, I dissent. I am persuaded that the initiative petitions at issue are "materials or information relating to the electoral process" within the meaning of section 4(f)(4) of the Voting Rights Act, 42 U.S.C. §1973b (f)(4), and that the state of Florida has "provided" those materials within the meaning of the statute.

I.

Section 4(f)(4) of the Voting Rights Act provides in relevant part:

> Whenever any state or political subdivision [subject to the bilingual electoral requirements] . . . provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the ~~language~~ of the applicable language minority group as well as in the English language.

---

8. Because this is an accelerated appeal involving the elections scheduled for November 8, 1988, the court heard oral argument in Miami, Florida, on November 3, 1988. Both the majority and dissenting opinions have been rushed. Although we feel we have been fully advised as to the issues and are comfortable that we have examined all the authorities, we note that both opinions are not polished products.

42 U.S.C. §1973b(f)(4).[1] The non-governmental appellees' argument that §4(f)(4) applies only to voter registration and actual elections is inconsistent with the plain meaning of the statute and is contrary to Congressional intent.

The statute refers not only to registration forms and ballots, but also to "other materials or information relating to the electoral process." Appellees' position would strip the quoted statutory language of any meaning. It seems clear to me that the petitions at issue easily fall within the phrase "materials or information relating to the electoral process." Certainly the language Congress chose—"relating to the electoral process"—is broad enough to encompass an initiative process which, if successful, results in placing a proposed constitutional amendment before the electorate of Florida for approval or rejection.

The Supreme Court's holding in *Allen v. State Board of Elections,* 393 U.S. 544 (1969), requires a conclusion that the instant petitions are "related to the electoral process." The Court held in *Allen* that the petition process to place candidate names on the ballot is a "standard, practice, or procedure with respect to voting" under section 5 of the Voting Rights Act, 42 U.S.C. §1973c. The nomination petition in *Allen* was a stage in the electoral process comparable to the petition process in this case. Moreover, the language of section 4(f)(4), "materials . . . related to the electoral process," is at least as broad as, if not broader than, the "standard, practice, or procedure with respect to voting" language in section 5 which the *Allen* Court applied to nominating petitions.

---

1. Practically identical language is found in section 203(c) of the Voting Rights Act, 42 U.S.C. § 1973aa-1a.

This conclusion is also supported by the Justice Department's regulations for implementing §4(f)(4), which provide as follows:

> (a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and *petitions.*

28 C.F.R. §55.19(a) (1987) (emphasis added). The Justice Department's inclusion of petitions as an example of materials that must be provided in the language of the applicable language minority group is consistent with its position that "the objective of the Act's provisions is to enable members of applicable language minority groups to participate effectively in the electoral process." 28 C.F.R. §55.2(b) (1987).[2]

---

2. The non-governmental appellees argue that the Justice Department guidelines for implementing the Act delegate authority to the affected jurisdictions to determine precisely what steps are necessary to comply with the Act. 28 C.F.R. § 55.2(c) (1987) does state that "[t]he determination of what is required for compliance with section 4(f)(4) and section 203 is the responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction." *See also* 28 C.F.R. § 55.14(c) (1987) (similar language). The import of this language is that the Justice Department encourages jurisdictions to fashion bilingual election procedures with the needs of their locale in mind. It does not provide a license to evade the mandate of the language minority provisions of the Voting Rights Act. Nor does it undermine the regulation's definition of the Act's minimum requirements—i.e., "to publish in the language of the . . . minority group materials distributed to . . . the electorate generally . . . for example . . . petitions."

Of course, courts owe considerable deference to the Attorney General's construction of the Voting Rights Act. *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131-32 (1978). Deference is especially appropriate here, because the Attorney General's interpretation mirrors the language of the statute itself and Congress has implicitly endorsed the Attorney General's inclusion of petitions as relating to the electoral process. *Pleasant Grove v. United States*, 479 U.S. 462, 468, 107 S.Ct. 794, 798 (1987); *see Extension of the Voting Rights Act: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on the Extension of the Voting Rights Act*, 97th Cong., 1st Sess. 2323-30 (1981).

Furthermore, the Supreme Court has stated that the Voting Rights Act is to be broadly construed. *Allen v. State Board of Elections*, 393 U.S. 544 (1969), stated that

> We must reject a narrow construction that appellees would give to § 5. . . . [T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes "all action necessary to make a vote effective."

393 U.S. at 565-66, quoting 42 U.S.C. §1973*l*(c)(1) (1964 ed., Supp. I). A broad construction of the already broad language of the language minority provision—"other materials or information related to the electoral process" —must necessarily encompass the instant petitions.

II.

The "state action" prong of our inquiry is a somewhat closer question. The language minority provisions of the Voting Rights Act apply to electoral materials which the state "provides." 42 U.S.C. §1973b(f)(4).

Before an initiative can be considered for the ballot in Florida, its sponsors must follow a detailed procedure prescribed by state law. The Florida Election Code, Fla. Stat.Ann. ch. 97-106, requires that the group sponsoring the proposed constitutional amendment must register with the Florida Department of State, Division of Elections, as a political committee before it begins collecting any signatures. Fla.Stat.Ann. §§100.371(3), 106.03. The sponsor must submit the text of the proposed amendment, and the form of the petition to be circulated, to the Florida Secretary of State for approval. State approval of this form is required before the sponsor may obtain any signatures. Fla.Stat.Ann. §100.371(3). The Florida Secretary of State has promulgated detailed regulations specifying the form that constitutional amendment initiative petitions must take. Among other things, the petition form must be printed on separate cards or sheets of paper and must fall within certain size requirements; the form must contain space for the signee's name and address; there must be space for only one signature per petition form; the petition form must conspicuously contain the full text of the proposed amendment preceded by the title and substance; and, if the text continues on the other side of the form, the same must be clearly indicated. Dept. of State Reg. 1C-7.009. In addition, a proposed constitutional amendment may relate to only one topic.[3]

The purpose and effect of these very specific and detailed state regulations of the form of initiative petitions

---

3. Before the voters of Florida are allowed to pass on the initiative, the Secretary of State must submit the text of the proposed amendment to the Attorney General of Florida, who in turn must seek an advisory opinion from the Supreme Court of Florida on the question whether the proposal complies with the state's "single-subject" requirement for all enactments. Fla. Stat.Ann §§15.21, 16.061.

are obviously to ensure that the presentation of the proposed amendment to each elector be in a manner that is easily understood. In my judgment, it is significant that the language minority provisions of the Voting Rights Act have the same purpose—to aid in the clear presentation of electoral materials to those members of the electorate who are not fluent in English. In other words, the state has affirmatively acted in several ways to safeguard elector understanding, but has failed to act in one way specifically required by the Voting Rights Act.

There is additional and significant state involvement in that state law prohibits *any* private action circulating initiative petitions until state officials approve the form of the petitions. Fla.Stat.Ann. §100.361(3).[4] Thus, the instant petitions, in English only, were submitted to the Florida Department of Elections pursuant to state law, and the state officials *approved* the petitions in their English-only form. I conclude that this state approval, together

---

4. After state approval of the petition form and after the signatures have been obtained, the Election Code and accompanying regulations then require the sponsors to submit the signed petitions to the Supervisor of Elections for each jurisdiction, who must verify the number of valid signatures that have been obtained. Fla.Stat.Ann. §100.371(4); Dept. of State Reg. 1C-7.0091 (1988). The Supervisors transmit forms that certify the number of valid signatures to the Division of Elections, which compiles the forms and determines whether the constitutional formula has been met. If the requirements have been fulfilled, the Secretary of State issues a certificate of ballot position for the proposed amendment. Fla.Stat.Ann. §100.371(4).

Appellees' argument that the state action is merely ministerial, *see also Montero v. Meyer*, Nos. 88-2469 & 88-2470 (10th Cir. Nov. 1, 1988), would have more force if one considered only the state action described in this footnote, i.e., counting and validating the signatures. However, the state action described and discussed in the text is of a different order. The state regulation of the format is obviously designed to insure understanding of the proposed amendment, and, significantly, the actual format to be used must be *approved* by the state.

with the extensive state regulation of the form of the petitions—regulation of a nature directly analogous to the language minority provisions—is sufficient state involvement to trigger application of the Voting Rights Act. Therefore, I conclude that the state has "provided" the electoral materials within the meaning of the Act.[5]

As noted above, the Justice Department regulations include "petitions" in the definition of "materials relating to the electoral process." 28 C.F.R. §55.19(a) (1987). Because petitions are almost always generated by private political activity, such as the initiative at issue here, the

---

5. I agree with appellees that their determination of the substance of the proposed amendment and their circulation of the petitions themselves is wholly private political activity. Such private activity is to be distinguished from the state activity in regulating and approving the form to ensure easy understanding.

The non-governmental appellees raise the specter of a violation of their First Amendment right to petition the government for redress of grievances, citing *Meyer v. Grant*, ... U.S. ....., 108 S.Ct. 1886 (1988). *Meyer* held invalid a Colorado provision making it a felony to pay petition circulators. Unlike the state provision which *Meyer* held unconstitutional, the instant federal regulation imposes no burden at all on the petition process. The minority language translation required by the Voting Rights Act imposes no conceivable hindrance to circulating the petitions or collecting signatures, and could not conceivably reduce the number of signatures which the sponsors could likely obtain. *Meyer*, ... U.S. at ....., 108 S.Ct. at 1892. The Voting Rights Act, as well as other federal regulation of the electoral process, has repeatedly withstood constitutional challenges to its validity. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976).

Clearly, the substance of the speech to be communicated is not affected by the Spanish translation of the proposal. As the Court noted in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), "States have enacted comprehensive and sometimes complex election codes. . . . [T]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." The bilingual requirement is a reasonable regulation to promote elector understanding, precisely like the other regulations adopted by Florida governing the form of initiative petitions.

regulation indicates that there is usually sufficient state involvement to trigger application of the Act.

Finally, my conclusion that the state action prong is satisfied by Florida's involvement in the initiative process is supported by the requirement under Supreme Court precedent that the language of the statute be given a broad interpretation. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).[6]

---

6. Because the state here has explicitly approved the petition form in English-only, I would conclude that the state action analysis of the Fourteenth Amendment has been satisfied. This case does involve extensive state regulation of the form in which petitions are to be presented to the electorate, regulation of the same character as the bilingual language provision. That by itself may be sufficient to satisfy the Fourteenth Amendment state action analysis, *see, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). However, I need not reach that issue for two reasons. First, and most important, a finding of state action in this case does not depend upon treating private action (by virtue of extensive state regulation) as the equivalent of state action. Rather, in this case, the state itself has acted; the state has affirmatively approved the English-only petition form.

Second, I suggest that the district court erred in relying only on Fourteenth Amendment cases. As stated in the text, the issue whether the state "provides" the petitions at issue here is a matter of statutory construction, and the Voting Rights Act is to be read broadly in order to effectuate its goals of an informed electorate and a fair political process. And in any event, I suggest that cases construing the Fifteenth Amendment provide the more appropriate precedent. Congress enacted the Voting Rights Act pursuant to the enforcement provision of the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966). The Supreme Court has indicated that a broad range of electoral activity, even purely private action, may constitute state action for Fifteenth Amendment purposes. *See, e.g., Terry v. Adams*, 345 U.S. 461 (1953) (actions of "self-governing voluntary club" held state action under the Fifteenth Amendment); *Id.* at 473 (opinion of Frankfurter, J.) ("The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are

(Continued on following page)

III.

Very few courts have confronted the question before us today. Appellees point to *Gerena-Valentin v. Koch*, 523 F.Supp. 176 (S.D.N.Y. 1981) as standing for the proposition that the language minority provisions of the Act do not apply to petitions. In *Gerena-Valentin*, a candidate for the New York City Council alleged that the city violated section 4(e) of the Act (which prohibits states and localities from conditioning the right to vote on the ability to read and understand English) by failing to provide bilingual aid in the ballot petition process. In rejecting the candidate's claim, the court stated that "there was no showing that the defendants failed to adequately provide bilingual assistance in the ballot petition process." 523 F.Supp. at 177. Although the court did say that "the failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote, particularly where as here the plaintiffs have not made any effort on their own to provide the bilingual aid they now request," 523 F.Supp. at 177, I note that the court was considering §4(e) of the Act, and not §4(f), which contains the language minority provisions. Moreover, *Gerena-Valentin* does not provide any factual detail; for example, it does not appear that New York played any part in establishing the form or contents of the petitions in that case. In sharp con-

---

Footnote continued—

colored."); *Smith v. Allwright*, 321 U.S. 649, 660 (1944) (primaries and other events essential to the electoral process subject to Fifteenth Amendment: "the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State.").

trast, Florida plays an extensive role in regulating the form of the initiative petitions at issue here. In any event, the sparse analysis provided by the *Gerena-Valentin* court leaves the opinion with little precedential weight.

The district court in *Zaldivar v. City of Los Angeles,* 590 F.Supp. 852 (D.C. Cal. 1984), held that the recall petition process was not part of the electoral process. However, the precedential value of that case was undermined on appeal. In reversing the district court's award of Rule 11 sanctions, the Ninth circuit, in dicta, indicated that the petition process probably was part of the electoral process under the Act. *Zaldivar v. City of Los Angeles,* 780 F.2d 823 (9th Cir. 1986).

Most recently, the Tenth Circuit concluded that the Voting Rights Act did not cover Colorado initiative petitions very similar to those at issue today. In *Montero v. Meyer,* Nos. 88-2469 & 88-2470, slip op. (10th Cir. Nov. 1, 1988), the Tenth Circuit concluded that Colorado initiative petitions were not materials relating to the electoral process, because "the 'electoral process' to which the minority language provisions of the Act apply does not commence under Colorado law until the Secretary of State certifies the measure is qualified for placement upon the ballot." *Montero,* slip op. at 8. In light of the plain meaning of the Act itself, the Attorney General's interpretation of the statute, and the Supreme Court's decision in *Allen*—all discussed in part I above —I find the analysis of the Tenth Circuit unpersuasive.

The Tenth Circuit also concluded that the petitions were not "provided" by the state, and thus that the "state action" prong of the Act was not satisfied. The court

assumed that the state action was merely "ministerial" and stated only that "[a]t most, the acts of the state officers could be regarded as 'regulatory,' but state regulation is insufficient to convert private action into state action." *Montero*, slip op. at 14-15. Because the Tenth Circuit's analysis of the "state action" prong was merely conclusory, I respectfully suggest that it should be accorded little precedential weight.

IV.

Because I believe that the initiative petitions at issue constitute "materials relating to the electoral process" that are "provided" by the state of Florida within the meaning of the language minority provisions of the Voting Rights Act, I must respectfully dissent.

(Filed October 18, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

ORDER DENYING APPLICATION FOR THREE-JUDGE PANEL

THIS CAUSE is before the Court upon the application of the Plaintiffs for a hearing of this cause by a three-judge panel.

After a review of the motion, it is

ORDERED AND ADJUDGED that the application is DENIED. The convening of three-judge courts is strictly construed.[1] The wording of the particular subsection[2] of the Voting Rights Act here in issue does not require a three-judge court in this instance. Furthermore, although the sole case[3] relied upon by the movants places emphasis on the special circumstances addressed by the Act, nonetheless, the actual holding in that case is confined to an interpretation of a different section of the Act.

1. *Allen v. State Board of Elections*, 393 U.S. 544, 561, 89 S.Ct. 817, 829, 22 L.Ed.3d 1 (1969).

2. 42 U.S.C. §1973aa-2.

3. *Allen v. State Board of Elections*, supra at footnote 1.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of October, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

see attached service list

SERVICE LIST

Case No: 88-1880-CIV-KEHOE

Robert A. Butterworth, Esq., Attorney General, State of FL

Donald M. Middlebrooks, Esq.

George Waas, Esq.

Mark A. Dienstag, Esq.

Steven A. Zalesin, Esq

Murray Greenberg, Esq., County Attorney

(Filed October 18, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

ORDER GRANTING LEAVE TO INTERVENE

THIS CAUSE is before the Court upon the motion of the Florida English Campaign (a Florida political committee), the U.S. English Legislative Task Force, Inc. (a District of Columbia non-profit corporation) and the U.S. English Foundation, Inc. (a District of Columbia non-profit corporation) to be joined or to intervene as non-governmental defendants in this action.

After a review of the motion, it is

ORDERED AND ADJUDGED that the motion to intervene is GRANTED. See Fed.R.Civ.P. 24(a)(2).

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of October, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

see attached service list

SERVICE LIST

Case No: 88-1880-CIV-KEHOE

Robert A. Butterworth, Esq., Attorney General, State of FL

Donald M. Middlebrooks, Esq.

George Waas, Esq.

Mark A. Dienstag, Esq.

Steven A. Zalesin, Esq.

Murray Greenberg, Esq., County Attorney

(Filed October 24, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

FINAL MEMORANDUM DECISION

THIS CAUSE is before the Court upon an emergency motion seeking preliminary injunctive relief[1] to restrain the Defendants, the Secretary of State of Florida and the Supervisors of Elections of the State of Florida ("the State"), from allowing any votes to be cast or counted with respect to a citizen initiative to amend the Florida Constitution (the "Official English Initiative") that is to be voted on at the general election on November 8, 1988. The Plaintiffs, four registered voters whose primary language is Spanish, seek injunctive and declaratory relief on the basis that the Official English Initiative was improperly placed on the November 8th ballot pursuant to petitions which, in certain counties of the state, were in violation of the language minority

1. At the expedited hearing in this matter, the parties agreed that the request for preliminary injunctive relief would be considered a prayer for final injunctive relief. Argument of counsel and presentation of evidence were predicated on that basis.

provisions[2] of the Voting Rights Act of 1965 ("the Act"). Also party to this action as Defendant Intervenors are the Florida English Campaign, the U.S. English Task Force, Inc. and the U.S. English Foundation, Inc., organizations supporting proposed constitutional amendment and representing the interests of the 362,555 proponents of the Official English Initiative.

In 1975, the Act was amended in order to protect language minorities. Pursuant to section 203(c) of the Act,[3] criteria were established for language minority political subdivisions. Six such counties[4] have been so identified in the State of Florida. Section 203(c) also provides:

> Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language. . .

At the expedited hearing held in this matter, the parties acknowledged that there are no disputed facts at issue and that the sole determination for the Court is whether the circulation of the initiative petition in the designated language minority political subdivisions only in the English language violated section 203(e) of the Act, as set forth above.

---

2. 42 U.S.C. §§1971 to 1974(e).

3. 42 U.S.C. 1973aa-1a(b).

4. Collier, Dade, Hardee, Hendry, Hillsborough and Monroe counties.

The Plaintiffs argue that because the Official English Initiative petitions were circulated in the designated language minority political subdivisions of Florida only in the English language, to the extent the petitions from such subdivisions contributed to placing the initiative on the election ballot, that contribution must be declared invalid. This, in turn, would mandate invalidation of the entire initiative, on account of an insufficient number and geographic distribution of the remaining valid petitions.

The parties do not dispute the fact that both the initiative proponents and the applicable state officers followed the initiative process set forth under Florida law. Accordingly, in the absence of contested issues of fact, and as supported by the pleadings and their attached exhibits, the Court makes a finding of fact that the Defendants and Intervenors acted in accordance with the prescribed state process to amend the Florida Constitution by the initiative process.

The Court further concludes, as a matter of law, that the State's involvement in the petition process does not amount to state action triggering application of the Voting Rights Act. The Supreme Court of the United States has held that state action is present where the governmental and private actors enjoy a "symbiotic relationship," *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 418 (1982), such that the state can be deemed a joint participant in the activity in question, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961); where the government has delegated to a private party a traditional state power, *Jackson v. Metropolitan Edison*

Co., 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974); or where the government and the private party have a nexus sufficiently close that the latter's action can be deemed that of the state. *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453. *See generally Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987). None of these circumstances are present here.

While a petition initiative in Florida is subject to state approval, such approval *must* be granted, so long as certain format requirements have been adhered to and the proposed amendment forming the basis of the petition embraces no more than one subject matter.

Pursuant to the initiative provision[5] of the Florida Constitution:

> The power to propose the revision or amendment of any portion or portions of this of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

The Secretary of State is charged under various state statutes with limited ministerial duties in connection with the initiative process. These duties consist of determining

---

5. Art. XI,-§3, Fla. Const.

that the total number and geographic distribution of petitions is proper, approving the form of the petition,[6] and submitting the petition to the Attorney General of Florida specifying that the petition proponents have fulfilled certain formal petition requirements.[7] The Attorney General of Florida is charged under state statute, upon receiving the proposed constitutional amendment, with petitioning the Supreme Court of Florida for an advisory opinion as to whether the proposed amendment embraces only one subject matter, as mandated by the Florida Constitution, and whether its presentation on the election ballot will conform to specified requirements as to form and style.[8] Also, the Florida Supervisors of Elections are charged with the duty of verifying and validating the petition's form and supporting signatures.[9]

After careful consideration, the Court concludes the foregoing regulatory scheme does not establish that the State of Florida "has so far insinuated itself into a position of interdependence with [private citizens] that it must be recognized as a joint participant in the challenged activity." *Burton,* 365 U.S. at 725, 81 S.Ct. at 862. Nor does it demonstrate "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson,* 419 U.S. at 351, 95 S.Ct. at 453. Finally, the petitioning by citizens to amend their state constitution does not represent a traditional state

---

6. §100.371(4), Fla. Stat.

7. §15.21, Fla. Stat.

8. §16.061, Fla. Stat.

9. §100.371(3) and (5), Fla. Stat.

power which has been delegated by the state to those private parties. To the contrary, such petitions represent the exercise by individuals of their fundamental rights to express themselves freely and to petition the government for redress of grievances, which are protected against governmental intrusion by the First Amendment to the United States Constitution. *Meyer v. Grant*, ... U.S. ....., 108 S.Ct. 1886 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at ....., 108 S.Ct. at 1892.). *See also* Smith, *"Shall Make No Law Abridging. . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 Cinc. L. Rev. 1153 (1986). Indeed, the Constitution of the State of Florida has expressly reserved to the people the power to initiate petitions to amend it. Fla. Con. Art. XI, §3.[10]

Furthermore, the Act expressly limits it applicability to those election materials which have been provided by the State. 242 U.S.C. §1973b(f)(4). *See also* 28 CFR §55.19 (requiring the relevant state or political subdivision to publish in the language of the applicable language minority group only those election materials which the jurisdiction has *"distributed to or provided for* the use of the electorate geneally." (emphasis added)). Thus, even were the Court to assume, without deciding the issue, that petitions do amount to election materials, a citizen-initiated petition in Florida is not within the Act's contemplation because the petition has not been provided by the State. While a petition initiated by the *State* might would

---

10. *See also* Fla. Admin. Code, Rule 1C - 7.009(6), deeming petitions to be "political advertisements."

fall into that category,[11] a petition such as the one here, which is initiated, formulated, distributed and circulated by private citizens, with only minimal, ministerial regulation by the state, clearly does not. Accordingly, state action warranting application of the Act's language minority provisions is not present.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the injunctive relief sought by the Plaintiffs is hereby DISMISSED.[12]

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

Murray Greenberg, Esq., Donald M. Middlebrooks, Esq., George Waas, Esq., Mark Dienstag, Esq.

---

11. At the hearing, counsel for the Intervenor pointed out that both Arizona and Massachusetts provides for the initiation of petitions by the state. The Court concludes that the reference in the Code of Federal Regulations to petitions as an example of election materials subject to the requirements of the Act denotes such state-initiated petitions, and/or ones which, although initiated by private citizens, nevertheless are subject to comprehensive state regulation to an extent beyond that which exists in the case at bar. 28 C.F.R. §55.19(a).

12. The Court stresses that this decision in no way represents a judgment as to the merits of the constitutional amendment at issue. Rather, the present ruling is limited to the narrow question of whether the petition to place the proposed amendment on the election ballot is subject to the language minority requirements of the Voting Rights Act.

(Filed October 24, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO: 88-1880-CIV-KEHOE

PEDRO DELGADO, et al.,
Plaintiffs,

v.

JIM SMITH, et al.,
Defendants.

FINAL JUDGMENT DENYING DECLARATORY AND INJUNCTIVE RELIEF

PURSUANT to this Court's Final Memorandum Decision of this date, denying the Plaintiffs' petition for declaratory and injunctive relief, it is

ORDERED AND ADJUDGED that a Final Judgment denying the Complaint for Declaratory and Injunctive Relief is hereupon entered in favor of the Defendants.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of October, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

copies furnished to:

Murray Greenberg, Esq., Donald Middlebrooks, Esq., George Waas, Esq., Mark Dienstag, Esq.

(Entered November 4, 1988)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-6068

D.C. Docket No. 88-1880

PEDRO DELGADO, MARCELO LLANES GREGORIO and MARTA R. TORRES,
Plaintiffs-Appellants,

versus

JIM SMITH, In his official capacity as Secretary of State of Florida and

DAVID LEAHY, in his official capacity as Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all county supervisors of Elections in the State of Florida,
Defendants-Appellees,

FLORIDA ENGLISH CAMPAIGN, U.S. ENGLISH LEGISLATIVE TASK FORCE Inc., and U.S. ENGLISH FOUNDATION, INC.,
Intervenors.

Appeal from the United States District Court for the Southern District of Florida

---

Before FAY and ANDERSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

---

*Honorable Clarence W. Allgood, Senior U. S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

ANDERSON, Circuit Judge, dissented and filed an opinion.

Entered: November 4, 1988
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: December 29, 1988

(Filed December 19, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-6068

PEDRO DELGADO, MARCELO LLANES, GREGORIO and MARTA R. TORRES,
Plaintiffs-Appellants,

versus

JIM SMITH, et al.,
Defendants-Appellees,
FLORIDA ENGLISH CAMPAIGN, et al.,
Intervenors.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 4, 1988, 11 Cir., 1988, ... F.2d .....).
(December 19, 1988)

Before FAY and ANDERSON, Circuit Judges, and ALLGOOD,* Senior District Judge.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

(Filed October 17, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 88-1880-CIV-KEHOE

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES, and MARTA R. TORRES,
Plaintiffs,

v.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, and DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all county Supervisors of Elections in the State of Florida,
Defendants.

PLAINTIFFS' APPLICATION FOR THREE-JUDGE COURT

Plaintiffs Pedro Delgado, Elia Gregorio, Marcelo Llanes and Marta R. Torres, pursuant to section 2284 of the Judicial Code, 28 U.S.C.A. § 2284 (West 1978 and 1988 Supp.), hereby make application for hearing of this cause by a three-judge district court, and request that the Chief Judge of the United States Court of Appeals for the Eleventh Circuit be immediately notified of this application and of plaintiffs' Emergency Motion for a Preliminary Injunction, in order that the necessary designation of judges for said court may be made. The grounds for this application are set forth in the Memorandum of Law submitted herewith.

Respectfully submitted,

Steel Hector & Davis
4000 Southeast Financial Center
Miami, Florida 33131-2398
Telephone (305) 577-2904

By: /s/ Donald M. Middlebrooks
Donald M. Middlebrooks
Steven J. Uhlfelder
Samuel J. Dubbin

-and-

Weil, Gotshal & Manges
Suite 2100
701 Brickell Avenue
Miami, Florida 33131
Telephone (305) 577-3100

By: /s/ Steven A. Zalesin
Steven A. Zalesin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Application for Three-Judge Court was served by overnight mail this 17th day of October, 1988, upon:

Murray Greenberg, Esquire
County Attorney
Metro Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993

The Hon. Robert A. Butterworth
Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32399-1050

and

Phyllis Slater, Esquire
Division of Elections
Legal Division
1801 The Capitol
Tallahassee, Florida 32399-0250

/s/ Donald M. Middlebrooks
Donald M. Middlebrooks

(Filed October 17, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 88-1880-CIV-KEHOE

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES, and MARTA R. TORRES,
Plaintiffs,

v.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, and DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all county Supervisors of Elections in the State of Florida,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR THREE-JUDGE COURT

Plaintiffs Pedro Delgado, Elia Gregorio, Marcelo Llanes and Marta R. Torres respectfully submit this Memorandum of Law in support of their application for hearing of this cause by a three-judge district court.

Introduction

This is an action to enforce the language minority requirements of the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1974(e) (West 1981 and 1988 Supp.) ("Voting Rights Act" or "Act"). Plaintiffs have raised claims

for relief that, under the express provisions of the Act, can be adjudicated only by a three-judge district court.

Discussion

Plaintiffs have alleged in their complaint that defendant Jim Smith, as Secretary of State of Florida, violated, *inter alia,* section 203(c) of the Voting Rights Act, 42 U.S.C.A. § 1973aa-1a, by approving for use throughout Florida an initiative petition that was printed in English only, and by certifying the initiative for the ballot based on such non-bilingual petitions. Section 204 of the Act, 42 U.S.C.A. § 1973aa-2, which provides for judicial relief from violations of section 203(c), states:

> An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall be to the Supreme Court.

42 U.S.C.A. § 1973aa-2.

Section 2284 of Title 28 of the United States Code provides in pertinent part that:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress . . . .
>
> (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:
>
> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the

> circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

28 U.S.C.A. § 2284.

Under the authority of these statutes, a three-judge district court must be convened to hear plaintiffs' Voting Rights Act claims against the defendant state officials. *See also Allen v. State Board of Elections*, 393 U.S. 544, 561-63 (1969) (in view of "extraordinary effect the [Voting Rights] Act might have a federal-state relationships and the orderly operation of state government," Congress intended that claims under the Act be determined by a district court of three judges).

Conclusion

The Court should grant plaintiffs' application for hearing by a three-judge court, and should immediately notify the Chief Judge of the United States Court of Appeals for the Eleventh Circuit, so that the necessary designation of judges can be made.

Respectfully submitted,

Steel Hector & Davis
4000 Southeast Financial Center
Miami, Florida 33131-2398
Telephone (305) 577-2904

By: /s/ Donald M. Middlebrooks
Donald M. Middlebrooks
Steven J. Uhlfelder
Samuel J. Dubbin

-and-

Weil, Gotshal & Manges
Suite 2100
701 Brickell Avenue
Miami, Florida 33131
Telephone (305) 577-3100

By: /s/ Steven A. Zalesin
Steven A. Zalesin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiffs' Application for Three-Judge Court was served by overnight mail this 17th day of October, 1988, upon:

Murray Greenberg, Esquire
County Attorney
Metro Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993

The Hon. Robert A. Butterworth
Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32399-1050

and

Phyllis Slater, Esquire
Division of Elections
Legal Division
1801 The Capitol
Tallahassee, Florida 32399-0250

/s/ Donald M. Middlebrooks
Donald M. Middlebrooks

Supreme Court, U.S.
FILED
MAR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 88-1327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,
Petitioners,

vs.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida, FLORIDA ENGLISH CAMPAIGN, U.S.ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S.ENGLISH FOUNDATION, INC.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BARNABY W. ZALL
Law Offices of Barnaby Zall
818 Connecticut Ave., N.W. #201
Washington, D.C. 20006-2702
Telephone: (202) 857-5360
Counsel of Record
Counsel for Non-governmental Respondents

14pp

NO. 88-1327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,
Petitioners,
vs.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida, FLORIDA ENGLISH CAMPAIGN, U.S.ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S.ENGLISH FOUNDATION, INC.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Non-governmental respondents hereby respectfully pray that this Court summarily affirm the decision of the courts below, deny the petition for writ of certiorari, or, if a writ of certiorari is granted at all, issue the writ on Question 3 listed above.

QUESTIONS PRESENTED

Being dissatisfied with the Questions Presented by petitioners in this case, non-governmental respondents hereby say that the questions in this case are:

1. Whether the Tenth and Eleventh Circuits correctly concluded that the Voting Rights Act does not require petitions circulated by private citizens to be printed in Spanish and English since (a) the circulation and signing of initiative petitions does not constitute "voting" within the meaning of the Act and (b) the act of circulating initiative petitions by private citizens does not constitute state action simply because the form of such petitions is regulated by the State?

2. Where (a) neither the statute nor the case law provides any right to a three-judge panel to review claims brought by private individuals that petitions circulated by private citizens must be printed in Spanish and English and (b) the request for a three-judge panel was not raised before the Court of Appeals, did the lower courts err in fully adjudicating and denying such claims on an expedited basis without invoking a three-judge panel?

3. Whether the attempt by the U.S. Department of Justice to require that petitions circulated by private citizens be printed in Spanish and English goes so far beyond the Voting Rights Act that it infringes on the First Amendment rights of the citizen circulators?

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF CONTEXT 2

REASONS FOR DENYING THE WRIT 2

I. THE COURT LACKS JURISDICTION TO HEAR THIS MATTER 2

A. The November 1988 Election on this Initiative Renders This Matter Moot. 2

B. Petitioners' Three-judge Panel Claim Was Not Adequately Pursued Below. 3

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER DECISION 4

III. THE POSITION OF THE JUSTICE DEPARTMENT UNCONSTITUTIONALLY INFRINGES ON RESPONDENTS' RIGHTS. 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Adickes v. Kress & Co., 398 U.S. 144 (1970) 5

Allen v. State Board of Elections, 393 U.S. 544 (1968) . .5

Batterton v. Francis, 432 U.S. 416 (1977) 6

Blum v. Bacon, 457 U.S. 132 (1982) 7

Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1988) 4

Delgado v. Smith, No. 88-1880-CIV-JWK (S.D.Fla. 1988) 4

Gerena-Valentin v. Koch, 523 F.Supp. 176 (S.D.N.Y. 1981). 5

Hillsborough County, Florida v. Automated Medical Laboratories, 471 U.S. 707 (1985) 6

In re Advisory Opinion to the Attorney General: English - The Official Language of Florida, 520 So.2d 11 (Fla. 1988) 1, 3

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 5

Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) 5

McLucas v. De Champion, 421 U.S. 21 (1975) 4

Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988) 4, 6

Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911) 3

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 7

Weinstein v. Bradford, 423 U.S. 147 (1975) 3

Zaldivar v. City of Los Angeles, 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*, 780 F.2d 823 (9th Cir. 1986) 4

STATUTES AND REGULATIONS

28 U.S.C.A. § 1254(1) (1966) 1

42 U.S.C.A. § 1971-1973bb (1981 & Supp. 1988) . . . . .passim

28 C.F.R. §§ 55.2(c), 55.14(c), 55.19(a). (1988) 6

OTHER

Letter from Thomas M. Boyd, Assistant Attorney General, to Hon. Benjamin A. Gilman, Feb. 14, 1989. 7

S.Rep. No. 417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S. Code, Cong. & Admin. News 177 . . .5

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C.A. § 1254(1). Respondents' counsel received the petition on February 14, 1989; permission was granted, after motion, for an extension of time to respond until March 27, 1989.

Petitioners' invocation of jurisdiction was qualified by a claim that neither of the lower courts had jurisdiction. Petition for Writ of Certiorari (hereinafter Pet.) at 1-2. For reasons more fully explained in the Reasons for Denying the Writ below, this Court lacks jurisdiction to hear this case. Briefly, (1) petitioners failed to raise their three-judge panel claim at the Court of Appeals, and (2) petitioners complain only about the Official Language initiative enacted last November, rendering this controversy moot.

In addition, Respondents note that the trial of this matter indicated a serious question of whether petitioners have standing to bring this action. Although petitioners claimed that they were harmed by not having sufficient advance notice of the circulation of the English-language petitions which were the subject of this proceeding, Pet. at 6, trial testimony demonstrated conclusively that petitioners and many others similarly situated had notice of the initiative and its contents many months before the initiative was qualified for the ballot. *See, e.g., In re: Advisory Opinion to the Attorney General: English - The Official Language of Florida*, 520 So.2d 11 (Fla. 1988)(fifteen organizations filed amicus briefs in opposition to proposed initiative). In fact, petitioners' expert witness testified that his efforts to organize opposition to the initiative were unsuccessful solely due to apparent apathy in the community; this lack of opposition was

confirmed when the initiative received 84 percent of the vote in the November 1988 election.

STATEMENT OF CONTEXT

Seventeen states have enacted laws designating English as their official languages.[1] This petition is one of three concurrent attempts by opponents of successful official language initiatives to obtain from this Court what the voters refused them: disapproval of the designation of English as the official language of a jurisdiction. *See*, *Montero v. Meyer*, No. 88-6376; *In re Delgado*, No. 88-1329. Several of the issues in this petition have been dealt with in the other two petitions; to avoid repetition, those responses will only be summarized herein.

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION TO HEAR THIS MATTER

A. The November 1988 Election on this Initiative Renders This Matter Moot.[2]

The initiative challenged by petitioners was approved by Florida's voters in the November 1988

---

1 Arizona (1988), Arkansas (1987), California (1986), Colorado (1988), Florida (1988), Georgia (1986), Hawaii (1978), Illinois (1969), Indiana (1985), Kentucky (1984), Mississippi (1987), Nebraska (1920), North Carolina (1987), North Dakota (1987), South Carolina (1987), Tennessee (1984), and Virginia (1986).

2 The argument summarized here is made more fully in the Opposition to the Petition for Writ of Certiorari in *Montero v. Meyer*, No. 88-6376 (hereinafter Montero Opp.), P. 5

general election. This Court could exercise jurisdiction only if the controversy is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

Petitioners challenged only this initiative. They did not certify this as a class action. In the absence of a class action, petitioners must show:

1. The challenged action was too short to be fully litigated; and

2. There is a reasonable expectation that the complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

Neither of these showings can be made: petitioners had plenty of time to challenge the initiative (as others did in *In re Advisory Opinion*, *supra*), and since the initiative passed, it will not come before petitioners again.

B. Petitioners' Three-judge Panel Claim Was Not Adequately Pursued Below.[3]

This Court lacks jurisdiction to hear petitioners' three-judge panel claim because petitioners failed to pursue their claim before the Court of Appeals. Petitioners raised this issue in a footnote in their brief to the Court of Appeals, but did not ask that court to rule on the three-judge panel issue. Petition for Writ of Mandamus, No. 88-1329 (hereinafter Mandamus Pet.) at 7.

---

3 The argument summarized here is made more fully in the Opposition to the Petition for Writ of Mandamus in *In re Delgado*, No. 88-1329 (hereinafter Mandamus Opp.).

Since petitioners failed to ask for relief from the Court of Appeals, they cannot ask for relief from this Court. *McLucas v. De Champion*, 421 U.S. 21, 30 (1975)("[W]e have held that, when a single district judge fails to call for the convention of a three-judge court and goes on to dispose of the case, an appeal lies only to the court of appeals.")

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER DECISION[4]

There is no conflict between the decision below and decisions of this Court and of other courts of appeal. As to courts which have looked specifically at petitioners' claims under the Voting Rights Act, the Eleventh Circuit noted: "the overly broad interpretation of the Act urged by appellants has been rejected by every court squarely to face the issue." Appendix to Petition for Writ of Certiorari (hereinafter App.), at A7. *See*, *Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D.Fla. 1988), *reprinted at* App. at A35, *affirmed by Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), *reprinted at* App. at A1; *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988); *Zaldivar v. City of Los Angeles*, 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*,

---

4 The argument summarized here is made more fully in the Montero Opp., Pp. 6-8, 9-13.

780 F.2d 823 (9th Cir. 1986);[5] *Gerena-Valentin v. Koch*, 523 F.Supp. 176 (S.D.N.Y. 1981).

Nor do petitioners' more imaginative claims fare any better. As to petitioners' concepts of "state action," the lower court decisions do not conflict with this Court's decisions. *See, e.g., Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)(two-part test: state-created right and state actor). Here, the right of initiative is not a state-created right, but one reserved by the people in their constitution. Nor are non-governmental respondents (who circulated the petitions) state actors, since initiatives are not public functions "traditionally the exclusive prerogative of the state," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974); nor was circulation of the petition "state compulsion" of a state-enforced custom, *Adickes v. Kress & Co.*, 398 U.S. 144 (1970); nor can the actions of citizens circulating petitions be fairly treated as those of the state itself, *Jackson*, *supra*; nor is there "joint action" in initiatives, *Lugar*, *supra*, 457 U.S. at 941, since the state is barred from actions reserved to the people.

As to petitioners' claims that the lower court ignored *Allen v. State Board of Elections*, 393 U.S. 544 (1968), respondents note that *Allen* dealt specifically with odious attempts to dilute the impact of black voting by circumventing § **5** of the Voting Rights Act. S.Rep. No. 417, 97th Cong., 2d Sess. 6, *reprinted in* 1982

---

5 Petitioners cite the Ninth Circuit's decision in *Zaldivar* for the proposition that the Ninth Circuit rejected the Voting Rights Act analysis by the District Court in that case. Pet. at 15, n.15. Petitioners ignore the Ninth Circuit's statement that "we do not review the court's decision on the Voting Rights issue for legal error. We hold only that plaintiffs' argument is plainly not frivolous under the first prong of Rule 11." 780 F.2d at 834.

U.S. Code, Cong. & Admin. News 177, 183. This case comes under §§ 4(f)(4) and 203 of the Act.

Finally, as to petitioners' claims that the lower courts failed to defer to the Attorney General's interpretive guidelines, respondents note that both the lower courts examined those guidelines carefully and abided by them. The guidelines explicitly state that decisions as to what materials are covered by the relevant portions of the Act were delegated to the affected jurisdictions. 28 C.F.R. §§ 55.2(c), 55.14(c), 55.19(a). The courts in this case and in *Montero* examined several jurisdictions' actions and determined that initiative petitions were not intended to be covered. App. at A9-11; *Montero*, 861 F.2d at 608-9, 609 n.4. In addition, petitioners fail to understand this Court's distinction between mandatory regulations and interpretive guidelines. *Hillsborough County, Florida v. Automated Medical Laboratories*, 471 U.S. 707, 718 (1985)(agencies "will make their intentions clear if they intend for their regulations to be exclusive"); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

III. THE POSITION OF THE JUSTICE DEPARTMENT UNCONSTITUTIONALLY INFRINGES ON RESPONDENTS' RIGHTS.

If the Court determines that a writ of certiorari should issue, non-governmental respondents respectfully suggest that an appropriate area of review would be the unconstitutional effect of the position of the United States Department of Justice.[6]

Now that two different circuits have rejected the view that the Department of Justice guidelines require citizens to print their initiative petitions in multiple languages, the Department of Justice should stop pressing a contrary view. Nevertheless, as recently as February 14, 1989, the Department of Justice sent its amicus brief to members of Congress to explain its views on the matter. Letter from Thomas M. Boyd, Assistant Attorney General to Hon. Benjamin A. Gilman, Feb. 14, 1989.

This Court may wish to affirm summarily the lower court decisions in this regard, or to issue a writ of cer-

---

6 Ordinarily respondents would file a cross-petition for certiorari on this constitutional issue. S.Ct.R. 19.5. Respondents, however, do not seek to alter in any way the judgment below. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979). Respondents' request is the mirror image of *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982), in that here respondents wish to support on constitutional grounds a decision below made partially on statutory grounds. The relief requested under this claim would not go further than that provided below, since the Eleventh Circuit explicitly rejected the Department of Justice's interpretation of its own guidelines as beyond the statute. App. at A11.

tiorari to affirm the lower court decisions on this point. If the Court determines to review any aspect of this case, respondents would urge that the Court also examine this issue.

CONCLUSION

Respondents respectfully request this Court to affirm summarily the lower courts' decisions, to review only the issue of whether the Department of Justice interpretive guidelines are unconstitutional or beyond the scope of the Act, or to deny the petition entirely.

RESPECTFULLY SUBMITTED,

BARNABY W. ZALL
Law Offices of Barnaby Zall
Suite 201
818 Connecticut Ave., N.W.
Washington, D.C. 20006-2702
Telephone: (202) 857-5360
Counsel of Record
Counsel for Non-governmental Respondents